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# Hamilton, Madison and Jay
# ON THE CONSTITUTION
## Selections from the Federalist Papers

Edited, with an Introduction, by
RALPH H. GABRIEL

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## Hamilton, Madison and Jay
## ON THE CONSTITUTION

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# Hamilton, Madison and Jay
# ON THE CONSTITUTION
## Selections from the Federalist Papers

Edited, with an Introduction, by

**RALPH H. GABRIEL**

*Sterling Professor of History, Yale University*

K. Doddanna.
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# PREFACE

The writers of the essays gathered together in the Federalist Papers followed a plan of argument and explanation that, of necessity, they drew up in haste. The exigencies of the struggle to win ratification of the new Constitution in New York State prevented any single editorial supervision of pieces written over a considerable period for immediate publication in the press. As a result some repetitions and redundancies occurred. Single papers, moreover, sometimes dealt with more than one topic, the announced title of the essay giving an inadequate idea of the material covered. To make this edition useful to the student who would see the Constitution through the eyes of the three men who wrote over the name, "Publius," their writings have been organized here into a pattern appropriate to their analysis and their argument.

The Table of Contents sets forth the outline. It directs the reader to the special topic in which he may be interested. The Federalist Papers in their original form suggest the intensity of the writers as they pushed on from paper to paper and preserve the atmosphere of a momentous controversy. The present generation reads the documents not to decide whether to vote for or against but rather to find in ideas of Publius assistance in the interpretation of the Constitution as it operates in a difficult and troubled time. The present arrangement seems appropriate to modern needs. When the familiar material is so organized it makes a powerful impact.

Spelling and punctuation have been revised to conform to current American usage. The editor's footnotes are indicated by brackets.

R. H. G.

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# THE ORIGIN AND SIGNIFICANCE OF THE FEDERALIST PAPERS

On May 27, 1787, the Georgian edifice in Philadelphia where the Declaration of Independence had been voted stirred again with quiet activity. Gentlemen in the wigs and short clothes of the period gathered in the assembly hall. They organized formally, voted to keep their discussions secret until a final result had been achieved, and chose George Washington to be their presiding officer. Twelve independent republics, to use the phrase of Noah Webster, had designated these men to be delegates to a convention called by a reluctant Congress of the Confederation to propose amendments to the instrument that bound together the thirteen American states in a confederacy. The absence from Philadelphia of a representative from Rhode Island suggested the particularism and spirit of independence that characterized not only that small New England commonwealth but to a lesser degree the citizens of all the states. The members of the Convention quietly disregarded the mandate of the Congress and boldly drew up a constitution for a unified nation.

This action marked the culmination of an evolution that had begun nearly a quarter of a century before when the Treaty of Paris had brought to a close that last imperial struggle between Britain and France for North America and had set the union jack permanently over what had been New France. In the troubled post-war years that followed 1763, when the thirteen continental colonies were each bound by ties of law and sentiment more closely to the homeland than to one another, here and there individual colonials began to think and speak of themselves as Americans and to envision an ultimate union of the thirteen provinces. The sentiment grew stronger in the trying times of the early 1770's. An armed uprising in April, 1775, in defense of ancient rights led some fifteen months later to the triumph of the nationalist sentiment when independence was declared. A long war, as John Marshall, one of Washington's young officers, later remarked, accustomed men of the several rebelling states not only to act in unison but to think of the Continental Congress as their government. The sufferings and the triumphs of the conflict, moreover, provided memories that strengthened attachment to the new nation.

When, however, the red-coated soldiers had embarked for home and New World men turned their attention to the tasks of peace, the citizens of the states tended to drop back to older and traditional ways of thinking. Local interests and local loyalties diminished and sometimes confused the national consciousness that had been fostered by the fight for liberty. Some New World conditions, furthermore, made national consciousness difficult. The United States comprised a vast geographical area whose size was daily brought home to the people by the time it took them to travel by stage coach or sailing ship from city to city or from state to state. James Madison of Virginia suggested the consequences of great distances when, on one occasion, he commented that he knew as little of the affairs of Georgia as of those of Kamchatka. A feeling of belonging to a common national group did not come easily to people so far removed from one another and so unlike in their interests and ways of life as those of New Hampshire and South Carolina. The Congress of the Confederation, moreover, lacked the power to govern necessary to make the nation a reality to its people. The Congress was little more than an assembly of ambassadors.

But in the critical era after 1783 the sentiment of nationalism still lived. Many of the former leaders of the Revolutionary struggle watched with apprehension the falling away of the spirit of union and the emergence of trends that forecast the possible dissolution of the Confederation. They believed that only a strong national government could cope successfully with political and economic problems at home and give to the United States such status in the world as would command respect abroad. Alexander Hamilton of New York was only one among many far-seeing men who bestirred themselves. These post-war nationalists took the initiative in an effort to bring about a meeting of representatives of the states that would take action to achieve a more perfect union. When Washington, architect of victory in the Revolution and known for his unswerving devotion to popular government, lent the support of his great name to the nationalist cause, the Convention at Philadelphia was assured. Its organization on May 27, 1787, marked the greatest victory for nationalism since Yorktown.

The delegates to the Constitutional Convention represented sovereign states, primary centers of power under the Articles of Confederation. State sovereignty presented the delegates with their most difficult problem. The Convention undertook to create a national government that would be a new center of power, superior to the states, yet not depriving them of their local powers and responsibilities. The framers of the Constitution built a structure that they thought of as a federal republic. They knew that they were pioneering in political institutions. The history of the West recorded the careers of several republics and the delegates at Philadelphia made good use of the knowledge to be derived from historical experience with republican institutions. But a federal republic, involving a careful balancing of powers as between the new nation and the older states, was a novelty. The Founding Fathers boldly ventured into an unmapped political area.

A second problem of almost equal complexity confronted the delegates at Philadelphia. The colonial objections to imperial policy and control which finally, in 1775, led to armed rebellion focussed American hostility upon the king. The Declaration of Independence justified separation, primarily by enumerating grievances against the king. The Revolutionary War eliminated monarchy from American political institutions. But in 1787 almost universally among the nations of the Western World an hereditary monarch was the head of the state. The Articles of Confederation had attempted no solution of the problem of the nature of the executive because the United States as organized under that instrument, though it possessed some national powers, was primarily a confederation of virtually independent sovereignties. The delegates at Philadelphia were convinced of the desirability of a strong executive, who would assume the responsibilities and give the leadership in the affairs of state ordinarily assumed and provided by a strong monarch. But in an age in which monarchy was the normal pattern the framers of the Constitution feared monarchy as tending toward such absolutism as that of Louis XIV of France. They solved their problem by creating the office of president, an office cunningly devised to keep the president responsible to the people, to give him such power as would make bold action possible, and to circumscribe the office in such manner as to make it impossible for the president to emerge as what the twentieth century calls a dictator. To the federal republic they added the presidential form of government.

James Madison, delegate from Virginia and the man who contributed more than any of his colleagues to the form of the Constitution, expressed in the fourteenth Federalist Paper the spirit that dominated the Convention. "Hearken not," said Madison to the people of the State of New York in 1787—

> to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly at-

> tempts what is impossible to accomplish. . . . But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their experience? . . . Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment have been numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind.

Months before this appeal by Madison the members of the Constitutional Convention recognized that, second only in difficulty to the framing of the Constitution, would be that of persuading the people of the states to accept this trail-blazing departure in government. The Convention requested the legislatures of the several states to provide for the election by the voters of special state conventions whose sole function would be to consider the instrument drawn up at Philadelphia and to accept or reject it. Grave doubts arose as to whether the people of New York were prepared to accept the proposed Constitution. Because of the importance of New York, possessed of a great harbor and located near the middle of the chain of states along the Atlantic coast, the proponents of change marshalled every resource to win the ratification of that crucial state.

Alexander Hamilton, citizen of the state, led the campaign. For his project of explaining to the voters the nature of the proposed Constitution and of laying before them the arguments for its adoption he called to his aid James Madison of Virginia and John Jay of New York. These three wrote a series of letters that were published in the New York press. These essays made an important impress on the citizens of New York. But it cannot be said that they won the victory for ratification in the New York convention. Hamilton, a delegate, achieved success for the new Constitution by his able political leadership. He was vastly aided by the fact that when the New York convention voted nine states had already ratified, a sufficient number to ensure that the national government created by the Constitution would become an immediate reality.

The essays in the New York press, all signed by "Publius," were quickly gathered together in a volume under the title, *The Federalist.* They have ever since been recognized as a contemporary interpretation of the Constitution of the first importance and, in addition, an unsurpassed expression of American political theory of the age. For more than a century and a half the Federalist Papers have been consulted by statesmen, judges, and students of politics as a primary source for the understanding of the Constitution. Such consultation seems destined to continue into an indefinite future. No single work in American political thought approaches in importance the Federalist Papers. It is a profound treatise in political science.

John Jay wrote only five of the essays that appeared over the signature, "Publius." He had seen service in the Revolution, had been a minister abroad, and had returned to the United States to become Secretary of Foreign Affairs for the Congress of the Confederation. James Madison, who wrote nearly half, gained his political experience first as a member of the Virginia legislature and later as a leading figure in the Congress of the Confederation. Participation in political affairs prepared him for his major role in the Constitutional Convention. Alexander Hamilton, from whose pen came more than half of the essays by "Publius," had been Washington's youthful and brilliant aide during much of the Revolutionary War. After the conflict ended, he practiced law in New York. Worried by the drift in national affairs, he found time to take a leading part in the movement that ended in the calling of the Constitutional Convention to which New York sent him as a delegate. All three of the authors of the Federalist Papers won fame in the government established under the Constitution which they did so much to bring into force. Hamilton became President Washington's Secretary of the Treasury at a critical period in the national finances. Jay served as the first Chief Justice of the United States. Madison rose to the post of Secretary of State and then to the presidency.

The attribution of authorship of the various papers reprinted in the following pages is the standard attribution of earlier scholars modified and corrected by Dr. Douglas Adair of the College of William and Mary. For the citizen of another nation who reads the Constitution for the first time the Federalist Papers offer explanations of the meaning of its words and phrases, as they did to the voters of New York in 1787-8. At the same time they provide twentieth century citizens of the United States when faced with some puzzling problem of constitutional interpretation insight into the minds and purposes of men who sat in the Constitutional Convention and into the understanding as to the meaning of this fundamental law on the part of men who lived and wrote at the time of its framing. The Federalist Papers remain a living document, important as an aid in the understanding of the past and in the making of decisions in the present. These selections contain the essence of that great series signed by "Publius."

RALPH H. GABRIEL

YALE UNIVERSITY
*December, 1953*

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# Hamilton, Madison and Jay
# ON THE CONSTITUTION

# PART ONE

# A NEW NATIONAL PHILOSOPHY

## 1. THE VALUE OF UNION

**HAMILTON:**

After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance, comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to those of patriotism, to heighten the solicitude which all considerate and good men must feel for the event. Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth. . . .

. . . Yes, my countrymen, I own to you that, after having given it an attentive consideration, I am clearly of opinion it is your interest to adopt it. I am convinced that this is the safest course for your liberty, your dignity, and your happiness. I affect not reserves which I do not feel. I will not amuse you with an appearance of deliberation when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded. The consciousness of good intentions disdains ambiguity. I shall not, however, multiply professions on this head. My motives must remain in the depository of my own breast. My arguments will be open to all, and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

It may perhaps be thought superfluous to offer arguments to prove the utility of the Union, a point, no doubt, deeply engraved on the hearts of the great body of the people in every State, and one which it may be imagined has no adversaries. But the fact is that we already hear it whispered in the private circles of those who oppose the new Constitution, that the thirteen States are of too great extent for any general system and that we must of necessity resort to separate confederacies of distinct portions of the whole. This doctrine will, in all probability, be gradually propagated till it has votaries enough to countenance an open avowal of it. For nothing can be more evident, to those who are able to take an enlarged view of the subject, than the alternative of an adoption of the new Constitution or a dismemberment of the Union. It will therefore be of use to begin by examining the advantages of that Union, the certain evils and the probable dangers to which every State will be exposed from its dissolution. . . . [No. 1]

**JAY:**

When the people of America reflect that they are now called upon to decide a question which, in its consequences, must prove one of the most important that ever engaged their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it will be evident.

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers. It is well worthy of consideration, therefore, whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies and give to the head of each the same kind of powers which they are advised to place in one national government.

It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly directed to that object. But politicians now appear who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in a division of the States into distinct confederacies or sovereignties. However extraordinary this new doctrine may appear, it nevertheless has its advocates; and certain characters who were much opposed to it formerly are at present of the number. Whatever may be the arguments or inducements which have wrought this change in the sentiments and declarations of these gentlemen, it certainly would not be wise in the people at large to adopt these new political tenets without being fully convinced that they are founded in truth and sound policy.

It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, widespreading country was the portion of our western sons of liberty. Providence has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants. A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities.

With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.

Similar sentiments have hitherto prevailed among all orders and denominations of men among us. To all general purposes we have uniformly been one people—each individual citizen everywhere enjoying the same national rights, privileges, and protection. As a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign states. . . .

It is worthy of remark that not only the first, but every succeeding Congress, as well as the late Convention, have invariably joined with the people in thinking that the prosperity of America depended on its union. To preserve and perpetuate it was the great object of the people in forming that Convention, and it is also the great object of the plan which the Convention has advised them to adopt. With what propriety, therefore, or for what good purposes are attempts at this particular period made by some men to depreciate the importance of the Union? Or why is it suggested that three or four confederacies would be better than one? I am persuaded in my own mind that the people have always thought right on this subject and that their universal and uniform attachment to the cause of the Union rests on great and weighty reasons, which I shall endeavor to develop and explain in some ensuing papers. They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the Convention seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy. That certainly would be the case, and I sincerely wish that it may be as clearly foreseen by every good citizen, that whenever the dissolution of the Union arrives, America will have reason to exclaim, in the words of the poet: "FAREWELL! A LONG FAREWELL TO ALL MY GREATNESS." [No. 2]

HAMILTON:

A firm Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection. . . . The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election—these are wholly new discoveries or have made their principal progress toward perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided. To this catalogue of circumstances that tend to the amelioration of popular systems of civil government, I shall venture, however novel it may appear to some, to add one more, on a principle which has been made the foundation of an objection to the new Constitution; I mean the *enlargement* of the *orbit* within which such systems are to revolve, either in respect to the dimensions of a single State or to the consolidation of several smaller States into one great Confederacy. . . .

So far are the suggestions of Montesquieu from standing in opposition to a general Union of the States that he explicitly treats of a "Confederate Republic" as the expedient for extending the sphere of popular government and reconciling the advantages of monarchy with those of republicanism. Says he—

> It is very probable that mankind would have been obliged at length to live constantly under the government of a single person had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a "Confederate Republic."
>
> This form of government is a convention by which several smaller states agree to become members of a larger one which they intend to form. It is a kind of assemblage of societies that constitute a new one, capable of increasing, by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.
>
> A republic of this kind, able to withstand an external

> force, may support itself without any internal corruptions. The form of this society prevents all manner of inconveniences.
>
> If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped and overpower him before he could be settled in his usurpation.
>
> Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved and the confederates preserve their sovereignty.
>
> As this government is composed of small republics, it enjoys the internal happiness of each; and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies.[1]

I have thought it proper to quote at length these interesting passages because they contain a luminous abridgment of the principal arguments in favor of the Union and must effectually remove the false impressions which a misapplication of other parts of the work was calculated to make. They have, at the same time, an intimate connection with the more immediate design of this paper, which is to illustrate the tendency of the Union to repress domestic faction and insurrection.

A distinction, more subtle than accurate, has been raised between a *confederacy* and a *consolidation* of the States. The essential characteristic of the first is said to be the restriction of its authority to the members in their collective capacities without reaching to the individuals of whom they are composed. It is contended that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor precedent. It has indeed happened that governments of this kind have generally operated in the manner which the distinction taken notice of supposes to be inherent in their nature; but there have been in most of them extensive exceptions to the practice, which serve to prove, as far as example will go, that there is no absolute rule on the subject. And it will be clearly shown in the course of this investigation that as far as the principle contended for has prevailed, it has been the cause of incurable disorder and imbecility in the government.

---

[1] *Spirit of Laws,* I, Bk. IX, Ch. 1.

The definition of a "confederate republic" seems simply to be "an assemblage of societies," or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished, so long as it exists, by a constitutional necessity, for local purposes, though it should be in perfect subordination to the general authority of the Union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government. . . . [No. 9]

MADISON:

Among the numerous advantages promised by a well-constructed Union none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired, but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes, and particularly for that prevailing and increasing distrust of public engagements and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other, and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man, and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power, or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that, where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors and those who are debtors fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a money interest, with many lesser interests, grow up of necessity in civilized nations and divide them into different classes actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause because his interest would certainly bias his judgment and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges, and the most numerous party or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality, yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects.*

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society, but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither normal nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself, and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention, have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians who have patronized this species of government have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs may, by intrigue, by corruption, or by other means, first obtain the suffrages and then betray the interests of the people. The question resulting is whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number in order to guard against the cabals of a few, and that, however large it may be, they must be limited to a certain number in order to guard against the confusion of a multitude. Hence the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free will be more likely to center in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect: the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government, and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments.

Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy, but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of Federalists. [No. 10]

## 2. THE NEED FOR A GOVERNMENT WITH THE POWER TO GOVERN

HAMILTON:

. . . The principal purposes to be answered by union are these: the common defense of the members, the preservation of the public peace as well against internal convulsions as external attacks, the regulation of commerce with other nations and between the States, the superintendence of our intercourse, political and commercial, with foreign countries.

The authorities essential to the common defense are these: to raise armies, to build and equip fleets, to prescribe rules for the government of both, to direct their operations, to provide for their support. These powers ought to exist without limitation *because it is impossible to foresee or define the extent and variety of national exigencies or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances and ought to be under the direction of the same councils which are appointed to preside over the common defense.

This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal: the *means* ought to be proportioned to the *end*; the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained. . . .

If the circumstances of our country are such as to demand a compound instead of a simple, a confederate instead of a sole, government, the essential point which will remain to be adjusted will be to discriminate the *objects,* as far as it can be done, which shall appertain to the different provinces or departments of power, allowing to each the most ample authority for fulfilling the objects committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws and to make all regulations which have relation to them. The same must be the case in respect to commerce and to every other matter to which its jurisdiction is permitted to extend. Is the administration of justice between the citizens of the same State the proper department of the local governments? These must possess all the authorities which are connected with this object and with every other that may be allotted to their particular cognizance and direction. Not to confer in each case a degree of power commensurate to the end would be to violate the most obvious rules of prudence and propriety and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success.

Who so likely to make suitable provisions for the public defense as that body to which the guardianship of the public safety is confided; which, as the center of information, will best understand the extent and urgency of the dangers that threaten, as the representative of the *whole,* will feel itself most deeply interested in the preservation of every part; which, from the responsibility implied in the duty assigned to it, will be most sensibly impressed with the necessity of proper exertions; and which, by the extension of its authority throughout the States, can alone establish uniformity and concert in the plans and measures by which the common safety is to be secured? Is there not a manifest inconsistency in devolving upon the federal government the care of the general defense and leaving in the State governments the *effective* powers by which it is to be provided for? Is not a want of co-operation the infallible consequence of such a system? And will not weakness, disorder, an undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense be its natural and inevitable concomitants? Have we not had unequivocal experience of its effects in the course of the Revolution which we have just accomplished?

Every view we may take of the subject, as candid inquirers after truth, will serve to convince us that it is both unwise and dangerous to deny the federal government an unconfined authority as to all those objects which are entrusted to its management. It will indeed deserve the most vigilant and careful attention of the people to see that it be modeled in such a manner as to admit of its being safely vested with the requisite powers. If any plan which has been, or may be, offered to our consideration should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected. A government the constitution of which renders it unfit to be trusted with all the powers which a free people *ought to delegate to any government* would be an unsafe and improper depositary of the *national interests.* Wherever *these* can with propriety be confided, the coincident powers may safely accompany them. This is the true result of all just reasoning upon the subject. And the adversaries of the plan promulgated by the Convention ought to have confined themselves to showing that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people. They ought not to have wandered into inflammatory declamations and unmeaning cavils about the extent of the powers. The *powers* are not too extensive for the *objects* of federal administration or, in other words, for the management of our *national interests,* nor can any satisfactory argument be framed to show that they are chargeable with such an excess. If it be true, as has been insinuated by some of the writers on the other side, that the difficulty arises from the nature of the thing and that the extent of the country will not permit us to form a government in which such ample powers can safely be reposed, it would prove that we ought to contract our views and resort to the expedient of separate confederacies which will move within more practicable spheres. For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests without daring to trust it with the authorities which are indispensable to their proper and efficient management. Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative. . . . [No. 23]

HAMILTON:

It was a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between *power* and *privilege* and combines the energy of government with the security of private rights. A failure in this delicate and important point is the great source of the inconveniences we experience, and if we are not cautious to avoid a repetition of the error in our future attempts to rectify and ameliorate our system, we may travel from one chimerical project to another; we may try change after change, but we shall never be likely to make any material change for the better.

The idea of restraining the legislative authority in the means of providing for the national defense is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened. We have seen, however, that it has not had thus far an extensive prevalency—that even in this country, where it made its first appearance, Pennsylvania and North Carolina are the only two States by which it has been in any degree patronized, and that all the others have refused to give it the least countenance, wisely judging that confidence must be placed somewhere; that the necessity of doing it is implied in the very act of delegating power; and that it is better to hazard the abuse of that confidence than to embarrass the government and endanger the public safety by impolitic restrictions on the legislative authority. The opponents of the proposed Constitution combat, in this respect, the general decision of America, and instead of being taught by experience the propriety of correcting any extremes into which we may have heretofore run, they appear disposed to conduct us into others still more dangerous and more extravagant. As if the tone of government had been found too high or too rigid, the doctrines they teach are calculated to induce us to depress or to relax it by expedients which, upon other occasions, have been condemned or forborne. It may be affirmed without the imputation of invective that if the principles they inculcate, on various points, could so far obtain as to become the popular creed, they would utterly unfit the people of this country for any species of government whatever. But a danger of this kind is not to be apprehended. The citizens of America have too much discernment to be argued into anarchy. And I am much mistaken if experience has not wrought a deep and solemn conviction in the public mind that greater energy of government is essential to the welfare and prosperity of the community.

It may not be amiss in this place concisely to remark the origin and progress of the idea which aims at the exclusion of military establishments in time of peace. Though in speculative minds it may arise from a contemplation of the nature and tendency of such institutions, fortified by the events that have happened in other ages and countries, yet as a national sentiment it must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these States have in general sprung.

In England, for a long time after the Norman Conquest, the authority of the monarch was almost unlimited. Inroads were gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct. But it was not till the Revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II had, by his own authority, kept on foot in time of peace a body of 5,000 regular troops. And this number James II increased to 30,000, who were paid out of his civil list. At the Revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed that "the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament,* was against law."

In that kingdom, when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate. The patriots who effected that memorable revolution were too temperate, too well informed, to think of any restraint on the legislative discretion. They were aware that a certain number of troops for guards and garrisons were indispensable, that no precise bounds could be set to the national exigencies, that a power equal to every possible contingency must exist somewhere in the government, and that when they referred the exercise of that power to the judgment of the legislature they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.

From the same source the people of America may be said to have derived an hereditary impression of danger to liberty from standing armies in time of peace. The circumstances of a revolution quickened the public sensibility on every point connected with the security of popular rights, and in some instances raised the warmth of our zeal beyond the degree which consisted with the due temperature of the body politic. The attempts of two of the States to restrict the authority of the legislature in the article of military establishments are of the number of these instances. The principles which had taught us to be jealous of the power of an hereditary monarch were by an injudicious excess extended to the representatives of the people in their popular assemblies. Even in some of the States, where this error was not adopted, we find unnecessary declarations that standing armies ought not to be kept up, in time of peace, *without the consent of the legislature.* I call them unnecessary because the reason which had introduced a similar provision into the English Bill of Rights is not applicable to any of the State constitutions. The power of raising armies at all, under those constitutions, can by no construction be deemed to reside anywhere else than in the legislatures themselves; and it was superfluous, if not absurd, to declare that a matter should not be done without the consent of a body which alone had the power of doing it. Accordingly, in some of these constitutions, and among others in that of this State of New York, which has been justly celebrated, both in Europe and America, as one of the best of the forms of government established in this country, there is a total silence upon the subject.

It is remarkable that even in the two States which seem to have meditated an interdiction of military establishments in time of peace, the mode of expression made use of is rather cautionary than prohibitory. It is not said that standing armies *shall* not be kept up, but that they *ought not* to be kept up in time of peace. This ambiguity of terms appears to have been the result of a conflict between jealousy and conviction, between the desire of excluding such establishments at all events and the persuasion that an absolute exclusion would be unwise and unsafe.

Can it be doubted that such a provision, whenever the situation of public affairs was understood to require a departure from it, would be interpreted by the legislature into a mere admonition and would be made to yield to the necessities or supposed necessities of the State? Let the fact already mentioned, with respect to Pennsylvania, decide. What then (it may be asked) is the use of such a provision if it cease to operate the moment there is an inclination to disregard it?

Let us examine whether there be any comparison, in point of efficacy, between the provision alluded to and that which is contained in the new Constitution for restraining the appropriations of money for military purposes to the period of two years. The former, by aiming at too much, is calculated to effect nothing; the latter, by steering clear of an imprudent extreme, and by being perfectly compatible with a proper provision for the exigencies of the nation, will have a salutary and powerful operation.

The legislature of the United States will be *obliged,* by this provision, once at least in every two years to deliberate upon the propriety of keeping a military force on foot, to come to a new resolution on the point, and to declare their sense of the matter by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be, no doubt, persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the *voice* but, if necessary, the *arm* of their discontent.

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army so large as seriously to menace those liberties could only be formed by progressive augmentations, which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in and transmitted along through all the successive variations in a representative body which biennial elections would naturally produce in both houses? Is it presumable that every man, the instant he took his seat in the national Senate or House of Representatives, would commence a traitor to his constituents and to his country? Can it be supposed that there would not be found one man discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger? If such presumptions can fairly be made, there ought at once to be an end of all delegated authority. The people should resolve to recall all the powers they have heretofore parted with out of their own hands and to divide themselves into as many States as there are counties, in order that they may be able to manage their own concerns in person.

If such suppositions could even be reasonably made, still the concealment of the design, for any duration, would be impracticable. It would be announced by the very circumstance of augmenting the army to so great an extent in time of profound peace. What colorable reason could be assigned, in a country so situated, for such vast augmentations of the military force? It is impossible that the people could be long deceived; and the destruction of the project and of the projectors would quickly follow the discovery. . . . [No. 26]

## 3. INADEQUACIES OF THE CONFEDERATION AND THE PROBLEMS OF THE CONVENTION

### HAMILTON:

. . . In pursuance of the plan which I have laid down for the discussion of the subject, the point next in order to be examined is the "insufficiency of the present Confederation to the preservation of the Union." It may perhaps be asked what need there is of reasoning or proof to illustrate a position which is not either controverted or doubted, to which the understandings and feelings of all classes of men assent, and which in substance is admitted by the opponents as well as by the friends of the new Constitution. It must in truth be acknowledged that, however these may differ in other respects, they in general appear to harmonize in this sentiment, at least, that there are material imperfections in our national system and that something is necessary to be done to rescue us from impending anarchy. The facts that support this opinion are no longer objects of speculation. They have forced themselves upon the sensibility of the people at large and have at length extorted from those whose mistaken policy has had the principal share in precipitating the extremity at which we are arrived a reluctant confession of the reality of those defects in the scheme of our federal government which have been long pointed out and regretted by the intelligent friends of the Union.

We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories and important posts in the possession of a foreign power which, by express stipulations, ought long since to have been surrendered? These are still retained, to the prejudice of our interests not less than of our rights. Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.[1] Are we even in a condition to remonstrate with dignity? The just imputations on our own faith, in respect to the same treaty, ought first to be removed. Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it. Is public credit an indispensable resource in time of public danger? We seem to have abandoned its cause as desperate and irretrievable. Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our government even forbids them to treat with us. Our ambassadors abroad are the mere pageants of mimic sovereignty. Is a violent and unnatural decrease in the value of land a symptom of national distress? The price of improved land in most parts of the country is much lower than can be accounted for by the quantity of waste land at market and can only be fully explained by that want of private and public confidence which are so alarmingly prevalent among all ranks and which have a direct tendency to depreciate property of every kind. Is private credit the friend and patron of industry? That most useful kind which relates to borrowing and lending is reduced within the narrowest limits, and this still more from an opinion of insecurity than from the scarcity of money. To shorten an enumeration of particulars which can afford neither pleasure nor instruction, it may in general be demanded, what indication is there of national disorder, poverty, and insignificance that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our public misfortunes?

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[1] "I mean for the Union."

This is the melancholy situation to which we have been brought by those very maxims and councils which would now deter us from adopting the proposed Constitution, and which, not content with having conducted us to the brink of a precipice, seem resolved to plunge us into the abyss that awaits us below. Here, my countrymen, impelled by every motive that ought to influence an enlightened people, let us make a firm stand for our safety, our tranquillity, our dignity, our reputation. Let us at last break the fatal charm which has too long seduced us from the paths of felicity and prosperity.

It is true, as has been before observed, that facts, too stubborn to be resisted, have produced a species of general assent to the abstract proposition that there exist material defects in our national system; but the usefulness of the concession, on the part of the old adversaries of federal measures, is destroyed by a strenuous opposition to a remedy upon the only principles that can give it a chance of success. While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable: at an augmentation of federal authority without a diminution of State authority; at sovereignty in the Union and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio.* This renders a full display of the principal defects of the Confederation necessary in order to show that the evils we experience do not proceed from minute or partial imperfections but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.

The great and radical vice in the construction of the existing Confederation is in the principle of *legislation for States or governments,* in their *corporate* or *collective capacities,* and as contradistinguished from the *individuals* of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of appointment, the United States has an indefinite discretion to make requisitions for men and money, but they have no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.

It is a singular instance of the capriciousness of the human mind that, after all the admonitions we have had from experience on this head, there should still be found men who object to the new Constitution for deviating from a principle which has been found the bane of the old, and which is in itself evidently incompatible with the idea of *government*—a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword to the mild influence of the magistracy.

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity, leaving nothing to future discretion and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiation were exhausted and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.

If the particular States in this country are disposed to stand in a similar relation to each other and to drop the project of a general *discretionary superintendence,* the scheme would indeed be pernicious and would entail upon us all the mischiefs which have been enumerated under the first head; but it would have the merit of being, at least, consistent and practicable. Abandoning all views towards a confederate government, this would bring us to a simple alliance offensive and defensive and would place us in a situation to be alternate friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us.

But if we are unwilling to be placed in this perilous situation, if we still will adhere to the design of a national government or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.

Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction, or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice or by military force—by the *coercion* of the magistracy or by the *coercion* of arms. The first kind can evidently apply only to men; the last kind must, of necessity, be employed against bodies politic, or communities, or States. It is evident that there is no process of a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty, but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war, and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

There was a time when we were told that breaches by the States of the regulations of the federal authority were not to be expected, that a sense of common interest would preside over the conduct of the respective members and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses for which they would blush in a private capacity.

In addition to all this, there is in the nature of sovereign power an impatience of control that disposes those who are invested with the exercise of it to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs by the operation of which there will be a perpetual effort in each to fly off from the common center. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us how little reason there is to expect that the persons entrusted with the administration of the affairs of the particular members of a confederacy will at all times be ready, with perfect good-humor and an unbiased regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of human nature.

If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity of the thing proposed or required to their immediate interests or aims, the momentary conveniences or inconveniences that would attend its adoption. All this will be done, and in a spirit of interested and suspicious scrutiny, without that knowledge of national circumstances and reasons of state which is essential to a right judgment, and with that strong predilection in favor of local objects which can hardly fail to mislead the decision. The same process must be repeated in every member of which the body is constituted; and the execution of the plans, framed by the councils of the whole, will always fluctuate on the discretion of the ill-informed and prejudiced opinion of every part. Those who have been conversant in the proceedings of popular assemblies, who have seen how difficult it often is, where there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points, will readily conceive how impossible it must be to induce a number of such assemblies deliberating at a distance from each other, at different times and under different impressions, long to co-operate in the same views and pursuits.

In our case, the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme which has, at length, arrested all the wheels of the national government and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration till the States can have time to agree upon a more substantial substitute for the present shadow of a federal government. Things did not come to this desperate extremity at once. The causes which have been specified produced at first only unequal and disproportionate degrees of compliance with the requisitions of the Union. The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying or to the least delinquent States. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burden? These were suggestions which human selfishness could not withstand, and which even speculative men who looked forward to remote consequences could not, without hesitation, combat. Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support till the frail and tottering edifice seems ready to fall upon our heads and to crush us beneath its ruins. [No. 15]

MADISON:

. . . Among the difficulties encountered by the Convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. Without substantially accomplishing this part of their undertaking they would have very imperfectly fulfilled the object of their appointment or the expectation of the public, yet that it could not be easily accomplished will be denied by no one who is unwilling to betray his ignorance of the subject. Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects, of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations. On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once the difficulty of mingling them together in their due proportions. The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that even during this short period the trust should be placed not in a few but a number of hands. Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men, whilst energy in government requires not only a certain duration of power but the execution of it by a single hand.

How far the Convention may have succeeded in this part of their work will better appear on a more accurate view of it. From the cursory view here taken, it must clearly appear to have been an arduous part.

Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments. Every man will be sensible of this difficulty, in proportion as he has been accustomed to contemplate and discriminate objects extensive and complicated in their nature. The faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most acute and metaphysical philosophers. Sense, perception, judgment, desire, volition, memory, imagination are found to be separated by such delicate shades and minute gradations that their boundaries have eluded the most subtle investigations and remain a pregnant source of ingenious disquisition and controversy. The boundaries between the great kingdom of nature and, still more, between the various provinces and lesser portions into which they are subdivided afford another illustration of the same important truth. The most sagacious and laborious naturalists have never yet succeeded in tracing with certainty the line which separates the district of vegetable life from the neighboring region of unorganized matter, or which marks the termination of the former and the commencement of the animal empire. A still greater obscurity lies in the distinctive characters by which the objects in each of these great departments of nature have been arranged and assorted.

When we pass from the works of nature, in which all the delineations are perfectly accurate and appear to be otherwise only from the imperfections of the eye which surveys them, to the institutions of man, in which the obscurity arises as well from the object itself as from the organ by which it is contemplated, we must perceive the necessity of moderating still further our expectations and hopes from the efforts of human sagacity. Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary, or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

The experience of ages, with the continued and combined labors of the most enlightened legislatures and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law and the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed. All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that, however accurately objects may be discriminated in themselves and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.

To the difficulties already mentioned may be added the interfering pretensions of the larger and smaller States. We cannot err in supposing that the former would contend for a participation in the government, fully proportioned to their superior wealth and importance; and that the latter would not be less tenacious of the equality at present enjoyed by them. We may well suppose that neither side would entirely yield to the other, and, consequently, that the struggle could be terminated only by compromise. It is extremely probable, also, that after the ratio of representation had been adjusted, this very compromise must have produced a fresh struggle between the same parties to give such a turn to the organization of the government and to the distribution of its powers as would increase the importance of the branches, in forming which they had respectively obtained the greatest share of influence. There are features in the Constitution which warrant each of these suppositions; and as far as either of them is well founded, it shows that the Convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations.

Nor could it have been the large and small States only which would marshal themselves in opposition to each other on various points. Other combinations, resulting from a difference of local position and policy, must have created additional difficulties. As every State may be divided into different districts and its citizens into different classes, which give birth to contending interests and local jealousies, so the different parts of the United States are distinguished from each other by a variety of circumstances which produce a like effect on a larger scale. And although this variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the government when formed, yet everyone must be sensible of the contrary influence which must have been experienced in the task of forming it.

Would it be wonderful if, under the pressure of all these difficulties, the Convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a constitution planned in his closet or in his imagination? The real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the Revolution.

We had occasion, in a former paper, to take notice of the repeated trials which have been unsuccessfully made in the United Netherlands for reforming the baneful and notorious vices of their constitution. The history of almost all the great councils and consultations held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies, and adjusting their respective interests is a history of factions, contentions, and disappointments and may be classed among the most dark and degraded pictures which display the infirmities and depravities of the human character. If, in a few scattered instances, a brighter aspect is presented, they serve only as exceptions to admonish us of the general truth and, by their lustre, to darken the gloom of the adverse prospect to which they are contrasted. In revolving the causes from which these exceptions result and applying them to the particular instances before us, we are necessarily led to two important conclusions. The first is that the Convention must have enjoyed, in a very singular degree, an exemption from the pestilential influence of party animosities—the disease most incident to deliberative bodies and most apt to contaminate their proceedings. The second conclusion is that all the deputations composing the Convention were satisfactorily accommodated by the final act, or were induced to accede to it by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good, and by a despair of seeing this necessity diminished by delays or by new experiments. [No. 37]

## PART TWO

# THE NATURE AND POWERS OF THE NEW GOVERNMENT

## 1. THE FEDERAL REPUBLIC

MADISON:

. . . The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America, with the fundamental principles of the Revolution, or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the Convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles but in the application of the term by political writers to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people, and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the Convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves; the duration of the appointments is equally conformable to the republican standard and to the model of State constitutions. The House of Representatives is periodically elective, as in all the States, and for the period of two years, as in the State of South Carolina. The Senate is elective for the period of six years, which is but one year more than the period of the Senate of Maryland and but two more than that of the Senates of New York and Virginia. The President is to continue in office for the period of four years; as in New York and Delaware, the chief magistrate is elected for three years, and in South Carolina for two years. In the other States the election is annual. In several of the States, however, no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally will be a subject of legal regulation, conformable to the reason of the case and the example of the State constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments, and in its express guaranty of the republican form to each of the latter.

"But it was not sufficient," say the adversaries of the proposed Constitution, "for the Convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form which regards the Union as a *Confederacy* of sovereign states; instead of which they have framed a *national* government which regards the Union as a *consolidation* of the States." And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the Convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

*First.*—In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America given by deputies elected for the special purpose, but on the other, that this assent and ratification is to be given by the people, not as

individuals composing one entire nation but as composin
the distinct and independent States to which they respec
tively belong. It is to be the assent and ratification of th
several States derived from the supreme authority in eac
State—the authority of the people themselves. The act, there
fore, establishing the Constitution will not be a *nationa*
but a *federal* act.

That it will be a federal and not a national act, as thes
terms are understood by the objectors—the act of the peo
ple, as forming so many independent States, not as form
ing one aggregate nation—is obvious from this single con
sideration that it is to result neither from the decision of
*majority* of the people of the Union nor from that of a *ma*
*jority* of the States. It must result from the unanimou
assent of the several States that are parties to it, differin
no otherwise from their ordinary assent than in its bein
expressed, not by the legislative authority, but by that o
the people themselves. Were the people regarded in thi
transaction as forming one nation, the will of the majorit
of the whole people of the United States would bind th
minority in the same manner as the majority in each Stat
must bind the minority; and the will of the majority mus
be determined either by a comparison of the individua
votes or by considering the will of the majority of the State
as evidence of the will of a majority of the people of th
United States. Neither of these rules has been adopted
Each State, in ratifying the Constitution, is considered a
a sovereign body, independent of all others, and only to b
bound by its own voluntary act. In this relation, then, th
new Constitution will, if established, be a *federal* and no
a *national* constitution.

The next relation is to the sources from which the or
dinary powers of government are to be derived. The Hous
of Representatives will derive its powers from the peopl
of America; and the people will be represented in the sam
proportion and on the same principle as they are in th

legislature of a particular State. So far the government is *national,* not *federal.* The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal,* not *national.* The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.

The difference between a federal and national government, as it relates to the *operation of the government,* is supposed to consist in this that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national,* not the *federal* character, though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings may, on the whole, designate it, in this relation, a *national* government.

But if the government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one, since its jurisdiction extends to certain enumerated objects only and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made according to the rules of the Constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal.* Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *States,* not by *citizens,* it departs from the *national* and advances towards the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn it is partly federal and partly national; in the operation of these powers it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments it is neither wholly federal nor wholly national. [No. 39]

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MADISON:

. . . That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done they may be reduced into different classes as they relate to the following different objects: (1) Security against foreign danger; (2) Regulation of the intercourse with foreign nations; (3) Maintenance of harmony and proper intercourse among the States; (4) Certain miscellaneous objects of general utility; (5) Restraint of the States from certain injurious acts; (6) Provisions for giving due efficacy to all these powers.

The powers falling within the *first* class are those of declaring war and granting letters of marque, of providing armies and fleets, of regulating and calling forth the militia, of levying and borrowing money.

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.

Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense.

But was it necessary to give an *indefinite power* of raising *troops* as well as providing fleets, and of maintaining both in *peace* as well as in war?

The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertions for its own safety.

How could a readiness for war in time of peace be safely prohibited unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions. . . .

. . . A standing force . . . is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat. It was remarked, on a former occasion, that the want of this pretext had saved the liberties of one nation in Europe. Being rendered by her insular situation and her maritime resources impregnable to the armies of her neighbors, the rulers of Great Britain have never been able, by real or artificial dangers, to cheat the public into an extensive peace establishment. The distance of the United States from the powerful nations of the world gives them the same happy security. A dangerous establishment can never be necessary or plausible so long as they continue a united people. But let it never, for a moment, be forgotten that they are indebted for this advantage to the Union alone. The moment of its dissolution will be the date of a new order of things. The fears of the weaker, or the ambition of the stronger States or Confederacies will set the same example in the New, as Charles VII[1] did in the Old World. The example will be followed here from the same motives which produced universal imitation there. Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy, and revenge. In America the miseries springing from her internal jealousies, contentions, and wars would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe.

This picture of the consequences of disunion cannot be too highly colored or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty ought to have it ever before his eyes, that he may cherish in his heart a due attachment to the Union of America and be able to set a due value on the means of preserving it.

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[1] [Reference here is to Charles VII, King of France, 1422-61.]

Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added. . . .

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties. . . .

The power of regulating and calling forth the militia has been already sufficiently vindicated and explained.

The power of levying and borrowing money, being the sinew of that which is to be exerted in the national defense, is properly thrown into the same class with it. This power also has been examined already with much attention and has, I trust, been clearly shown to be necessary both in the extent and form given to it by the Constitution. I will address one additional reflection only to those who contend that the power ought to have been restrained to external taxation—by which they mean taxes on articles imported from other countries. It cannot be doubted that this will always be a valuable source of revenue; that for a considerable time it must be a principal source; that at this moment it is an essential one. But we may form very mistaken ideas on this subject if we do not call to mind in our calculations that the extent of revenue drawn from foreign commerce must vary with the variations both in the extent and the kind of imports, and that these variations do not correspond with the progress of population, which must be the general measure of the public wants. As long as agriculture continues the sole field of labor, the importation of manufactures must increase as the consumers multiply. As soon as domestic manufactures are begun by the hands not called for by agriculture, the imported manufactures will decrease as the numbers of people increase. In a more remote stage, the imports may consist in a considerable part of raw materials which will be wrought into articles for exportation, and will, therefore, require rather the encouragement of bounties than to be loaded with discouraging duties. A system of government, meant for duration, ought to contemplate these revolutions and be able to accommodate itself to them.

Some who have not denied the necessity of the power of taxation have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," [2] amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it, though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances must be very singularly expressed by the terms, "to raise money for the general welfare."

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[2] [Article I, sec. 8, clause 1.]

But what color can the objection have when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning, and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning and can have no other effect than to confound and mislead is an absurdity which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter. . . . [No. 41]

## 2. THE CENTRAL GOVERNMENT AND THE STATES

### MADISON:

A *fifth* class of provisions[1] in favor of the federal authority consists of the following restrictions on the authority of the several States:

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[1] [For the other four classes of provisions cf. page 51f.]

(1) No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver a legal tender in payment of debts; pass any bill of attainder, *ex-post-facto* law, or law impairing the obligation of contracts; or grant any title of nobility.[2]

The prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union and, for reasons which need no explanation, is copied into the new Constitution. The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers, and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.

The right of coining money, which is here taken from the States, was left in their hands by the Confederation as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance also the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints and diversify the forms and weights of the circulating pieces. The latter inconvenience defeats one purpose for which the power was originally submitted to the federal head; and as far as the former might prevent an inconvenient remittance of gold and silver to the central mint for recoinage, the end can be as well attained by local mints established under the general authority.

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[2] [Article I, section 10, clause 1.]

The extension of the prohibition to bills of credit must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government constitutes an enormous debt against the States chargeable with this unadvised measure which must long remain unsatisfied, or rather an accumulation of guilt which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed that the same reasons which show the necessity of denying to the States the power of regulating coin prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money than to coin gold or silver. The power to make anything but gold and silver a tender in payment of debts is withdrawn from the States on the same principle with that of issuing a paper currency.

Bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment.

(2) No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any

> agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.[3]

The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the convenience of their imports and exports, and to the United States a reasonable check against the abuse of this discretion. The remaining particulars of this clause fall within reasonings which are either so obvious or have been so fully developed that they may be passed over without remark.

The *sixth* and last class consists of the several powers and provisions by which efficacy is given to all the rest.

1. Of these the first is the—

> power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.[4]

Few parts of the Constitution have been assailed with more intemperance than this, yet on a fair investigation of it no part can appear more completely invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter. Those who object to the article, therefore, as a part of the Constitution, can only mean that the *form* of the provision is improper. But have they considered whether a better form could have been substituted?

There are four other possible methods which the Constitution might have taken on this subject. They might

[3] [Article I, section 10, clause 2.]

[4] [Article I, section 8, clause 17.]

have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not *expressly* delegated; they might have attempted a positive enumeration of the powers comprehended under the general terms "necessary and proper"; they might have attempted a negative enumeration of them by specifying the powers excepted from the general definition; they might have been altogether silent on the subject, leaving these necessary and proper powers to construction and inference.

Had the Convention taken the first method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term "expressly" with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction. It would be easy to show, if it were necessary, that no important power, delegated by the Articles of Confederation, has been or can be executed by Congress without recurring more or less to the doctrine of *construction* or *implication.* As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interests by doing nothing or of violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not *expressly* granted.

Had the Convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates, accommodated, too, not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the *particular powers,* which are the means of attaining the *object* of the general power, must always necessarily vary with that object and be often properly varied whilst the object remains the same.

Had they attempted to enumerate the particular powers or means not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical, and would have been liable to this further objection that every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions and described the residue by the general terms "not necessary or proper," it must have happened that the enumeration would comprehend a few of the excepted powers only, that these would be such as would be least likely to be assumed or tolerated because the enumeration would of course select such as would be least necessary or proper, and that the unnecessary and improper powers included in the residuum would be less forcibly excepted than if no partial enumeration had been made.

Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. Had this last method, therefore, been pursued by the Convention, every objection now urged against their plan would remain in all its plausibility, and the real inconvenience would be incurred of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union.

If it be asked what is to be the consequence in case the Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning, I answer the same as if they should misconstrue or enlarge any other power vested in them, as if the general power had been reduced to particulars and any one of these were to be violated; the same, in short, as if the State legislatures should violate the irrespective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation to sound the alarm to the people and to exert their local influence in effecting a change of federal representatives. There being no such intermediate body between the State legislatures and the people interested in watching the conduct of the former, violations of the State constitutions are more likely to remain unnoticed and unredressed.

(2) This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.[5]

The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.

[5] [Article VI, clause 2.]

In the first place, as these constitutions invest the State legislatures with absolute sovereignty, in all cases not excepted by the existing articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power contained in the proposed Constitution.

In the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other constitutions and would consequently be valid in some of the States at the same time that it would have no effect in others.

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster in which the head was under the direction of the members.

(3) The Senators and Representatives, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution.[6]

It has been asked why it was thought necessary that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States in favor of the State constitutions.

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[6] [Article VI, clause 3.]

Several reasons might be assigned for the distinction. I content myself with one which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution. The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance, and will probably forever be conducted by the officers, and according to the laws, of the States.

4. Among the provisions for giving efficacy to the federal powers might be added those which belong to the executive and judiciary departments; but as these are reserved for particular examination in another place, I pass them over in this.

We have now reviewed, in detail, all the Articles composing the sum or quantity of power delegated by the proposed Constitution to the federal government, and are brought to this undeniable conclusion that no part of the power is unnecessary or improper for accomplishing the necessary objects of the Union. The question, therefore, whether this amount of power shall be granted or not resolves itself into another question, whether or not a government commensurate to the exigencies of the Union shall be established or, in other words, whether the Union itself shall be preserved. [No. 44]

MADISON:

. . . The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of *new powers* to the Union than in the invigoration of its *original powers.* The regulation of commerce, it is true, is a new power, but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important, and yet the present Congress have as complete authority to *require* of the States indefinite supplies of money for the common defense and general welfare as the future Congress will have to require them of individual citizens; and the latter will be no more bound than the States themselves have been to pay the quotas respectively taxed on them. Had the States complied punctually with the Articles of Confederation, or could their compliance have been enforced by as peaceable means as may be used with success towards single persons, our past experience is very far from countenancing an opinion that the State governments would have lost their constitutional powers and have gradually undergone an entire consolidation. To maintain that such an event would have ensued would be to say at once that the existence of the State governments is incompatible with any system whatever that accomplishes the essential purposes of the Union. [No. 45]

MADISON:

Having reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim—that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone that the charge cannot be supported and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying, "There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this—that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him if the king, who is the sole executive magistrate, had possessed also the complete legislative power or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law, nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock, nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the *same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*" Some of these reasons are more fully explained in other passages, but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author. . . . [No. 47]

## 3. CHECKS AND BALANCES

**MADISON:**

To what expedient, then, shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is that, as all these exterior provisions are found to be inadequate, the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations which may perhaps place it in a clearer light and enable us to form a more correct judgment of the principles and structure of the government planned by the Convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department by which the latter may be led to support the constitutional rights of the former without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions and to the federal Constitution, it will be found that if the latter does not perfectly correspond with them the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America which place that system in a very interesting point of view.

*First.* In a single republic, all the power surrendered by the people is submitted to the administration of a single government, and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.

*Second.* It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one, by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security, because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects, and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizens will be diminished, and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves, so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext also to provide for the security of the former by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the *republican cause,* the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the *federal principle.* [No. 51]

## 4. THE POWER TO REGULATE THE ELECTION OF FEDERAL OFFICIALS

HAMILTON:

The natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members.

It is in these words:

> The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter *such regulations,* except as to the *places* of choosing senators.[1]

This provision has not only been declaimed against by those who condemn the Constitution in the gross, but it has been censured by those who have objected with less latitude and greater moderation; and in one instance it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system.

I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition that *every government ought to contain in itself the means of its own preservation.* Every just reasoner will, at first sight, approve an adherence to this rule in the work of the Convention, and will disapprove every deviation from it which may not appear to have been dictated by the necessity of incorporating into the work some particular ingredient with which a rigid conformity to the rule was incompatible. Even in this case, though he may acquiesce in the necessity, yet he will not cease to regard and to regret a departure from so fundamental a principle as a portion of imperfection in the system which may prove the seed of future weakness and, perhaps, anarchy.

It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the Convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations, which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose whenever extraordinary circumstances might render that interposition necessary to its safety.

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[1] [Article I, section 4, clause 1.]

Nothing can be more evident than that an exclusive power of regulating elections for the national government in the hands of the State legislatures would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk. The extravagant surmises of a distempered jealousy can never be dignified with that character. If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government. And as it is more consonant to the rules of a just theory to trust the Union with the care of its own existence than to transfer that care to any other hands, if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed than where it would unnaturally be placed. . . . [No. 59]

# PART THREE

# THE CONSTITUTION AND THE TAXING POWER

## 1. TAXING POWERS OF THE NATION AND OF THE STATES

**HAMILTON:**

. . . A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.

As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies.

As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the States in their collective capacities, the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes.

Did not experience evince the contrary, it would be natural to conclude that the propriety of a general power of taxation in the national government might safely be permitted to rest on the evidence of these propositions, unassisted by any additional arguments or illustrations. But we find, in fact, that the antagonists of the proposed Constitution, so far from acquiescing in their justness or truth, seem to make their principal and most zealous effort against this part of the plan. It may therefore be satisfactory to analyze the arguments with which they combat it.

Those of them which have been most labored with that view seem in substance to amount to this: "It is not true, because the exigencies of the Union may not be susceptible of limitation, that its power of laying taxes ought to be unconfined. Revenue is as requisite to the purposes of the local administrations as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is, therefore, as necessary that the State governments should be able to command the means of supplying their wants as that the national government should possess the like faculty in respect to the wants of the Union. But an indefinite power of taxation in the *latter* might, and probably would in time, deprive the *former* of the means of providing for their own necessities and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land, as it is to have power to pass all laws that may be *necessary* for carrying into execution the authorities with which it is proposed to vest it, the national government might at any time abolish the taxes imposed for State objects upon the pretense of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenues. And thus all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of the State governments."

This mode of reasoning appears sometimes to turn upon the supposition of usurpation in the national government; at other times it seems to be designed only as a deduction from the constitutional operation of its intended powers. It is only in the latter light that it can be admitted to have any pretensions to fairness. The moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss and fairly put ourselves out of the reach of all reasoning. Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle and knows not on which side to turn to extricate itself from the perplexities into which it has so rashly adventured. Whatever may be the limits or modifications of the powers of the Union, it is easy to imagine an endless train of possible dangers; and by indulging an excess of jealousy and timidity, we may bring ourselves to a state of absolute scepticism and irresolution. I repeat here what I have observed in substance in another place—that all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers. The State governments, by their original constitutions, are invested with complete sovereignty. In what does our security consist against usurpation from that quarter? Doubtless, in the manner of their formation and in a due dependence of those who are to administer them upon the people. If the proposed construction of the federal government be found, upon an impartial examination of it, to be such as to afford, to a proper extent, the same species of security, all apprehensions on the score of usurpation ought to be discarded.

It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the State governments. What side would be likely to prevail in such a conflict must depend on the means which the contending parties could employ towards insuring success. As in republics strength is always on the side of the people, and as there are weighty reasons to induce a belief that the State governments will commonly possess most influence over them, the natural conclusion is that such contests will be most apt to end to the disadvantage of the Union; and that there is greater probability of encroachments by the members upon the federal head than by the federal head upon the members. But it is evident that all conjectures of this kind must be extremely vague and fallible, and that it is by far the safest course to lay them altogether aside and to confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people, who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the general and the State governments. Upon this ground, which is evidently the true one, it will not be difficult to obviate the objections which have been made to an indefinite power of taxation in the United States. [No. 31]

HAMILTON:

. . . An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts, and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.* I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the First Article provides expressly that Congress shall exercise "exclusive legislation" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress "to lay and collect taxes, duties, imposts and excises"; and the second clause of the tenth section of the same Article declares that, *"no State shall,* without the consent of Congress, *lay any imposts or duties on imports or exports,* except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned, but this power is abridged by another clause which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to the *duties* on *imports.* This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish a *uniform rule* of naturalization throughout the United States." This must necessarily be exclusive, because if each State had power to prescribe a *distinct rule,* there could not be a *uniform rule.*

A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a "negative pregnant"—that is, a *negation* of one thing, and an *affirmance* of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them *absolutely* from the imposition of taxes of the former kind and to leave them at liberty to lay others *subject to the control* of the national legislature. The restraining or prohibitory clause only says that they shall not, *without the consent of Congress,* lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion, which is that the States, *with the consent* of the national legislature, might tax imports and exports, and that they might tax every other article, *unless controlled* by the same body. If this was the intention, why not leave it, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention and that it will not bear a construction of the kind.

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union, but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence, but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide and might require reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power, and the rule that all authorities of which the States are not explicitly divested in favor of the Union remain with them in full vigor is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the First Article consists altogether of such provisions. This circumstance is a clear indication of the sense of the Convention, and furnishes a rule of interpretation out of the body of the act which justifies the position I have advanced and refutes every hypothesis to the contrary.[1] . . . [No. 32]

## HAMILTON:

The residue of the argument against the provisions of the Constitution in respect to taxation is ingrafted upon the following clause. The last clause of the eighth section of the First Article of the plan under consideration authorizes the national legislature "to make all laws which shall be *necessary* and *proper* for carrying into execution *the powers* by that Constitution vested in the government of the United States, or in any department or officer thereof"; and the second clause of the Sixth Article declares, "that the Constitution and the laws of the United States made *in pursuance thereof,* and the treaties made by their authority, shall be the *supreme law* of the land, anything in the constitution or laws of any State to the contrary notwithstanding."

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated, as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.

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[1] [This issue has later been clarified by the Tenth Amendment to the Constitution (cf. p. 224).]

What is a power but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a *legislative* power but a power of making *laws?* What are the *means* to execute a *legislative* power but *laws?* What is the power of laying and collecting taxes but a *legislative power,* or a power of *making laws,* to lay and collect taxes? What are the proper means of executing such a power but *necessary* and *proper* laws?

This simple train of inquiry furnishes us at once with a test by which to judge of the true nature of the clause complained of. It conducts us to this palpable truth that a power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws *necessary* and *proper* to carry it into effect? I have applied these observations thus particularly to the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result in relation to all other powers declared in the Constitution. And it is *expressly* to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all *necessary* and *proper* laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

But *suspicion* may ask, Why then was it introduced? The answer is that it could only have been done for greater caution and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it, as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare.

But it may be again asked, Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents, in the last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues it should undertake to abrogate a land-tax imposed by the authority of a State, would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax which its constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the Convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

But it is said that the laws of the Union are to be the *supreme law* of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A "law," by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for *political power and supremacy.* But it will not follow from this doctrine that acts of the large society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation that it *expressly* confines this supremacy to laws made *pursuant to the Constitution;* which I mention merely as an instance of caution in the Convention, since that limitation would have been to be understood, though it had not been expressed.

Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of tax laid by the authority of the State (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other in a manner equally disadvantageous to both. It is to be hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience. The inference from the whole is that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports. . . . [No. 33]

HAMILTON:

I flatter myself it has been clearly shown in my last number that the particular States, under the proposed Constitution, would have *coequal* authority with the Union in the article of revenue, except as to duties on imports. As this leaves open to the States far the greatest part of the resources of the community, there can be no color for the assertion that they would not possess means as abundant as could be desired for the supply of their own wants, independent of all external control. That the field is sufficiently wide will more fully appear when we come to advert to the inconsiderable share of the public expenses for which it will fall to the lot of the State governments to provide. . . .

To form a more precise judgment of the true merits of this question, it will be well to advert to the proportion between the objects that will require a federal provision in respect to revenue and those which will require a State provision. We shall discover that the former are altogether unlimited, and that the latter are circumscribed within very moderate bounds. In pursuing this inquiry we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a *capacity* to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. It is true, perhaps, that a computation might be made with sufficient accuracy to answer the purpose of the quantity of revenue requisite to discharge the subsisting engagements of the Union and to maintain those establishments which, for some time to come, would suffice in time of peace. But would it be wise, or would it not rather be the extreme of folly, to stop at this point and to leave the government entrusted with the care of the national defense in a state of absolute incapacity to provide for the protection of the community against future invasions of the public peace by foreign war or domestic convulsions? If, on the contrary, we ought to exceed this point, where can we stop short of an indefinite power of providing for emergencies as they may arise? Though it is easy to assert, in general terms, the possibility of forming a rational judgment of a due provision against probable dangers, yet we may safely challenge those who make the assertion to bring forward their data and may affirm that they would be found as vague and uncertain as any that could be produced to establish the probable duration of the world. Observations confined to the mere prospects of internal attacks can deserve no weight, though even these will admit of no satisfactory calculation; but if we mean to be a commercial people, it must form a part of our policy to be able one day to defend that commerce. The support of a navy and of naval wars would involve contingencies that must baffle all the efforts of political arithmetic.

Admitting that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations. A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? No reasonable man would hastily pronounce that we are entirely out of its reach. Or if the combustible materials that now seem to be collecting should be dissipated without coming to maturity, or if a flame should be kindled without extending to us, what security can we have that our tranquillity will long remain undisturbed from some other cause or from some other quarter? Let us recollect that peace or war will not always be left to our option, that, however moderate or unambitious we may be, we cannot count upon the moderation or hope to extinguish the ambition of others. Who could have imagined at the conclusion of the last war that France and Britain, wearied and exhausted as they both were, would so soon have looked with so hostile an aspect upon each other? To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace, and that to model our political systems upon speculations of lasting tranquillity is to calculate on the weaker springs of the human character.

What are the chief sources of expense in every government? What has occasioned that enormous accumulation of debts with which several of the European nations are oppressed? The answer plainly is wars and rebellions, the support of those institutions which are necessary to guard the body politic against these two most mortal diseases of society. The expenses arising from those institutions which are relative to the mere domestic police of a state, to the support of its legislative, executive, and judicial departments, with their different appendages, and to the encouragement of agriculture and manufactures (which will comprehend almost all the objects of state expenditure) are insignificant in comparison with those which relate to the national defense. . . . [No. 34]

## 2. THE TAXING POWERS AND CLASS INTERESTS

**HAMILTON:**

Before we proceed to examine any other objections to an indefinite power of taxation in the Union, I shall make one general remark, which is, that if the jurisdiction of the national government, in the article of revenue, should be restricted to particular objects, it would naturally occasion an undue proportion of the public burdens to fall upon those objects. Two evils would spring from this source: the oppression of particular branches of industry and an unequal distribution of the taxes as well among the several States as among the citizens of the same State.

Suppose, as has been contended for, the federal power of taxation were to be confined to duties on imports, it is evident that the government, for want of being able to command other resources, would frequently be tempted to extend these duties to an injurious excess. There are persons who imagine that they can never be carried to too great a length, since the higher they are, the more it is alleged they will tend to discourage an extravagant consumption to produce a favorable balance of trade and to promote domestic manufactures. But all extremes are pernicious in various ways. Exorbitant duties on imported articles would beget a general spirit of smuggling, which is always prejudicial to the fair trader and eventually to the revenue itself: they tend to render other classes of the community tributary, in an improper degree, to the manufacturing classes, to whom they give a premature monopoly of the markets; they sometimes force industry out of its more natural channels into others in which it flows with less advantage; and in the last place, they oppress the merchant, who is often obliged to pay them himself without any retribution from the consumer. When the demand is equal to the quantity of goods at market, the consumer generally pays the duty, but when the markets happen to be overstocked, a great proportion falls upon the merchant and sometimes not only exhausts his profits but breaks in upon his capital. I am apt to think that a division of the duty between the seller and the buyer more often happens than is commonly imagined. It is not always possible to raise the price of a commodity in exact proportion to every additional imposition laid upon it. The merchant, especially in a country of small commercial capital, is often under a necessity of keeping prices down in order to a more expeditious sale.

The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition that it is far more equitable that the duties on imports should go into a common stock than that they should redound to the exclusive benefit of the importing States. But it is not so generally true as to render it equitable that those duties should form the only national fund. When they are paid by the merchant they operate as an additional tax upon the importing State, whose citizens pay their proportion of them in the character of consumers. In this view they are productive of inequality among the States, which inequality would be increased with the increased extent of the duties. The confinement of the national revenues to this species of imposts would be attended with inequality, from a different cause, between the manufacturing and the non-manufacturing States. The States which can go farthest towards the supply of their own wants by their own manufactures will not, according to their numbers or wealth, consume so great a proportion of imported articles as those States which are not in the same favorable situation. They would not, therefore, in this mode alone contribute to the public treasury in a ratio to their abilities. To make them do this it is necessary that recourse be had to excises the proper objects of which are particular kinds of manufactures. New York is more deeply interested in these considerations than such of her citizens as contend for limiting the power of the Union to external taxation may be aware of. New York is an importing State and is not likely speedily to be, to any great extent, a manufacturing State. She would, of course, suffer in a double light from restraining the jurisdiction of the Union to commercial imposts.

So far as these observations tend to inculcate a danger of the import duties being extended to an injurious extreme it may be observed, conformably to a remark made in another part of these papers, that the interest of the revenue itself would be a sufficient guard against such an extreme. I readily admit that this would be the case as long as other resources were open, but if the avenues to them were closed, *hope,* stimulated by necessity, would beget experiments fortified by rigorous precautions and additional penalties which, for a time, would have the intended effect, till there had been leisure to contrive expedients to elude these new precautions. The first success would be apt to inspire false opinions, which it might require a long course of subsequent experience to correct. Necessity, especially in politics, often occasions false hopes, false reasonings, and a system of measures correspondingly erroneous. But even if this supposed excess should not be a consequence of the limitation of the federal power of taxation, the inequalities spoken of would still ensue, though not in the same degree, from the other causes that have been noticed. Let us now return to the examination of objections.

One which, if we may judge from the frequency of its repetition, seems most to be relied on is that the House of Representatives is not sufficiently numerous for the reception of all the different classes of citizens, in order to combine the interests and feelings of every part of the community and to produce a due sympathy between the representative body and its constituents. This argument presents itself under a very specious and seducing form and is well calculated to lay hold of the prejudices of those to whom it is addressed. But when we come to dissect it with attention, it will appear to be made up of nothing but fair-sounding words. The object it seems to aim at is, in the first place, impracticable, and in the sense in which it is contended for, is unnecessary. I reserve for another place the discussion of the question which relates to the sufficiency of the representative body in respect to numbers and shall content myself with examining here the particular use which has been made of a contrary supposition in reference to the immediate subject of our inquiries.

The idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never take place in practice. Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants, in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend, and they are aware that, however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves. They are sensible that their habits in life have not been such as to give them those acquired endowments without which, in a deliberative assembly, the greatest natural abilities are for the most part useless, and that the influence and weight and superior acquirements of the merchants render them more equal to a contest with any spirit which might happen to infuse itself into the public councils unfriendly to the manufacturing and trading interests. These considerations and many others that might be mentioned prove, and experience confirms it, that artisans and manufacturers will commonly be disposed to bestow their votes upon merchants and those whom they recommend. We must, therefore, consider merchants as the natural representatives of all these classes of the community.

With regard to the learned professions, little need be observed; they truly form no distinct interest in society and, according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other and of other parts of the community.

Nothing remains but the landed interest; and this, in a political view, and particularly in relation to taxes, I take to be perfectly united from the wealthiest landlord down to the poorest tenant. No tax can be laid on land which will not affect the proprietor of millions of acres as well as the proprietor of a single acre. Every landholder will therefore have a common interest to keep the taxes on land as low as possible, and common interest may always be reckoned upon as the surest bond of sympathy. But if we even could suppose a distinction of interest between the opulent landholder and the middling farmer, what reason is there to conclude that the first would stand a better chance of being deputed to the national legislature than the last? If we take fact as our guide and look into our own senate and assembly, we shall find that moderate proprietors of land prevail in both; nor is this less the case in the senate, which consists of a smaller number, than in the assembly, which is composed of a greater number. Where the qualifications of the electors are the same, whether they have to choose a small or a large number, their votes will fall upon those in whom they have most confidence, whether these happen to be men of large fortunes, or of moderate property, or of no property at all.

It is said to be necessary that all classes of citizens should have some of their own number in the representative body in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free. Where this is the case, the representative body, with too few exceptions to have any influence on the spirit of the government, will be composed of landholders, merchants, and men of the learned professions. But where is the danger that the interests and feelings of the different classes of citizens will not be understood or attended to by these three descriptions of men? Will not the landholder know and feel whatever will promote or insure the interest of landed property? And will he not, from his own interest in that species of property, be sufficiently prone to resist every attempt to prejudice or encumber it? Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts, to which his commerce is so nearly allied? Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society?

If we take into the account the momentary humors or dispositions which may happen to prevail in particular parts of the society, and to which a wise administration will never be inattentive, is the man whose situation leads to extensive inquiry and information less likely to be a competent judge of their nature, extent, and foundation than one whose observation does not travel beyond the circle of his neighbors and acquaintances? Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct? This dependence and the necessity of being bound, himself and his posterity, by the laws to which he gives his assent are the true, and they are the strong, chords of sympathy between the representative and the constituent.

There is no part of the administration of government that requires extensive information and a thorough knowledge of the principles of political economy so much as the business of taxation. The man who understands those principles best will be least likely to resort to oppressive expedients or sacrifice any particular class of citizens to the procurement of revenue. It might be demonstrated that the most productive system of finance will always be the least burdensome. There can be no doubt that in order to a judicious exercise of the power of taxation, it is necessary that the person in whose hands it is should be acquainted with the general genius, habits, and modes of thinking of the people at large and with the resources of the country. And this is all that can be reasonably meant by a knowledge of the interests and feelings of the people. In any other sense the proposition has either no meaning or an absurd one. And in that sense let every considerate citizen judge for himself where the requisite qualification is most likely to be found. [No. 35]

# PART FOUR

# THE LEGISLATIVE BRANCH

## 1. THE HOUSE OF REPRESENTATIVES

MADISON:

. . . The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of twenty-five years, must have been seven years a citizen of the United States, must, at the time of his election, be an inhabitant of the State he is to represent, and, during the time of his service, must be in no office under the United States. Under these reasonable limitations the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The term for which the representatives are to be elected falls under a second view which may be taken of this branch. In order to decide on the propriety of this article, two questions must be considered: first, whether biennial elections will, in this case, be safe; secondly, whether they be necessary or useful.

*First.* As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose does not appear to be susceptible of any precise calculation and must depend on a variety of circumstances with which it may be connected. Let us consult experience, the guide that ought always to be followed whenever it can be found.

The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known to ancient polity, it is in more modern times only that we are to expect instructive examples. And even here, in order to avoid a research too vague and diffusive, it will be proper to confine ourselves to the few examples which are best known and which bear the greatest analogy to our particular case. The first to which this character ought to be applied is the House of Commons in Great Britain. The history of this branch of the English Constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent date prove that parliaments were to *sit* only every year; not that they were to be *elected* every year. And even these annual sessions were left so much at the discretion of the monarch that, under various pretexts, very long and dangerous intermissions were often contrived by royal ambition. To remedy this grievance, it was provided by a statute in the reign of Charles II that the intermissions should not be protracted beyond a period of three years. On the accession of William III, when a revolution took place in the government, the subject was still more seriously resumed and it was declared to be among the fundamental rights of the people that parliaments ought to be held *frequently*. By another statute which passed a few years later in the same reign, the term "frequently," which had alluded to the triennial period settled in the time of Charles II, is reduced to a precise meaning, it being expressly enacted that a new parliament shall be called within three years after the termination of the former. The last change, from three to seven years, is well known to have been introduced pretty early in the present century, under an alarm for the Hanoverian succession. From these facts it appears that the greatest frequency of elections which has been deemed necessary in that kingdom for binding the representatives to their constituents does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with the other necessary reforms, would so far extend the influence of the people over their representatives as to satisfy us that biennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents. . . . [No. 52]

MADISON:

I shall here, perhaps, be reminded of a current observation, "that where annual elections end, tyranny begins." If it be true, as has often been remarked, that sayings which become proverbial are generally founded in reason, it is not less true that when once established, they are often applied to cases to which the reason of them does not extend. I need not look for a proof beyond the case before us. What is the reason on which this proverbial observation is founded? No man will subject himself to the ridicule of pretending that any natural connection subsists between the sun or the seasons and the period within which human virtue can bear the temptations of power. Happily for mankind, liberty is not, in this respect, confined to any single point of time, but lies within extremes which afford sufficient latitude for all the variations which may be required by the various situations and circumstances of civil society. The election of magistrates might be, if it were found expedient, as in some instances it actually has been, daily, weekly, or monthly, as well as annual; and if circumstances may require a deviation from the rule on one side, why not also on the other side? Turning our attention to the periods established among ourselves for the election of the most numerous branches of the State legislatures, we find them by no means coinciding any more in this instance than in the elections of other civil magistrates. In Connecticut and Rhode Island, the periods are half-yearly. In the other States, South Carolina excepted, they are annual. In South Carolina they are biennial—as is proposed in the federal government. Here is a difference, as four to one, between the longest and shortest periods; and yet it would be not easy to show that Connecticut or Rhode Island is better governed or enjoys a greater share of rational liberty than South Carolina; or that either the one or the other of these States is distinguished in these respects, and by these causes, from the States whose elections are different from both.

In searching for the grounds of this doctrine, I can discover but one, and that is wholly inapplicable to our case. The important distinction, so well understood in America, between a constitution established by the people and unalterable by the government and a law established by the government and alterable by the government seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution as the ordinary objects of legislative provision. They have accordingly, in several instances, actually changed by legislative acts some of the most fundamental articles of the government. They have in particular, on several occasions, changed the period of election and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act continued themselves in place four years beyond the term for which they were elected by the people. An attention to these dangerous practices has produced a very natural alarm in the votaries of free government, of which frequency of elections is the cornerstone, and has led them to seek for some security to liberty against the danger to which it is exposed. Where no constitution, paramount to the government, either existed or could be obtained, no constitutional security, similar to that established in the United States, was to be attempted. Some other security, therefore, was to be sought for; and what better security would the case admit than that of selecting and appealing to some simple and familiar portion of time as a standard for measuring the danger of innovations, for fixing the national sentiment, and for uniting the patriotic exertions? The most simple and familiar portion of time applicable to the subject was that of a year, and hence the doctrine has been inculcated by a laudable zeal to erect some barrier against the gradual innovations of an unlimited government, that the advance towards tyranny was to be calculated by the distance of departure from the fixed point of annual elections. But what necessity can there be of applying this expedient to a government limited, as the federal government will be, by the authority of a paramount constitution? Or who will pretend that the liberties of the people of America will not be more secure under biennial elections, unalterably fixed by such a constitution, than those of any other nation would be where elections were annual or even more frequent but subject to alterations by the ordinary power of the government?

The second question stated is whether biennial elections e necessary or useful. The propriety of answering this uestion in the affirmative will appear from several very bvious considerations.

No man can be a competent legislator who does not add o an upright intention and a sound judgment a certain egree of knowledge of the subjects on which he is to legslate. A part of this knowledge may be acquired by means f information which lie within the compass of men in rivate as well as public stations. Another part can only e attained, or at least thoroughly attained, by actual exerience in the station which requires the use of it. The eriod of service ought, therefore, in all such cases, to bear ome proportion to the extent of practical knowledge equisite to the due performance of the service. The peiod of legislative service established in most of the States or the more numerous branch is, as we have seen, one ear. The question then may be put into this simple form: oes the period of two years bear no greater proportion o the knowledge requisite for federal legislation than one ear does to the knowledge requisite for State legislation? he very statement of the question, in this form, suggests he answer that ought to be given to it.

In a single State, the requisite knowledge relates to the xisting laws which are uniform throughout the State and ith which all the citizens are more or less conversant, nd to the general affairs of the State, which lie within a mall compass, are not very diversified and occupy much f the attention and conversation of every class of people. he great theatre of the United States presents a very diferent scene. The laws are so far from being uniform that hey vary in every State, whilst the public affairs of the nion are spread throughout a very extensive region, and re extremely diversified by the local affairs connected with hem, and can with difficulty be correctly learned in any ther place than in the central councils to which a knowledge of them will be brought by the representatives of every part of the empire. Yet some knowledge of the affairs, and even of the laws, of all the States ought to be possessed by the members from each of the States. How can foreign trade be properly regulated by uniform laws without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated without some knowledge of their relative situations in these and other respects? How can taxes be judiciously imposed and effectually collected if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided without a similar knowledge of many internal circumstances by which the States are distinguished from each other? These are the principal objects of federal legislation and suggest most forcibly the extensive information which the representatives ought to acquire. The other interior objects will require a proportional degree of information with regard to them.

It is true that all these difficulties will, by degrees, be very much diminished. The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code. Improvements on the first draughts will every year become both easier and fewer. Past transactions of the government will be a ready and accurate source of information to new members. The affairs of the Union will become more and more objects of curiosity and conversation among the citizens at large. And the increased intercourse among those of different States will contribute not a little to diffuse a mutual knowledge of their affairs, as this again will contribute to a general assimilation of their manners and laws. But with all these abatements, the business of federal legislation must continue so far to exceed, both in novelty and difficulty, the legislative business of a single State as to justify the longer period of service assigned to those who are to transact it.

A branch of knowledge which belongs to the acquirements of a federal representative and which has not been mentioned is that of foreign affairs. In regulating our own commerce he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations, for that, as far as it is a proper object of municipal legislation, is submitted to the federal government. And although the House of Representatives is not immediately to participate in foreign negotiations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will frequently deserve attention in the ordinary course of legislation and will sometimes demand particular legislative sanction and co-operation. Some portion of this knowledge may, no doubt, be acquired in a man's closet, but some of it also can only be derived from the public sources of information, and all of it will be acquired to best effect by a practical attention to the subject during the period of actual service in the legislature.

There are other considerations, of less importance, perhaps, but which are not unworthy of notice. The distance which many of the representatives will be obliged to travel, and the arrangements rendered necessary by that circumstance, might be much more serious objections with fit men to this service if limited to a single year than if extended to two years. No argument can be drawn on this subject from the case of the delegates to the existing Congress. They are elected annually, it is true, but their re-election is considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle.

A few of the members, as happens in all such assemblies, will possess superior talents, will, by frequent re-elections, become members of long standing, will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them. This remark is no less applicable to the relation which will subsist between the House of Representatives and the Senate.

It is an inconvenience mingled with the advantages of our frequent elections even in single States, where they are large and hold but one legislative session in a year, that spurious elections cannot be investigated and annulled in time for the decision to have its due effect. If a return can be obtained, no matter by what unlawful means, the irregular member, who takes his seat of course, is sure of holding it a sufficient time to answer his purposes. Hence a very pernicious encouragement is given to the use of unlawful means for obtaining irregular returns. Were elections for the federal legislature to be annual, this practice might become a very serious abuse, particularly in the more distant States. Each house is, as it necessarily must be, the judge of the elections, qualifications, and returns of its members; and whatever improvements may be suggested by experience for simplifying and accelerating the process in disputed cases, so great a portion of a year would unavoidably elapse before an illegitimate member could be dispossessed of his seat that the prospect of such an event would be little check to unfair and illicit means of obtaining a seat.

All these considerations taken together warrant us in affirming that biennial elections will be as useful to the affairs of the public as we have seen that they will be safe to the liberty of the people. [No. 53]

MADISON:

The *third* charge[1] against the House of Representatives is that it will be taken from that class of citizens which will have least sympathy with the mass of the people and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.

Of all the objections which have been framed against the federal Constitution, this is perhaps the most extraordinary. Whilst the objection itself is levelled against a pretended oligarchy, the principle of it strikes at the very root of republican government.

The aim of every political constitution is or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one is such a limitation of the term of appointments as will maintain a proper responsibility to the people.

Let me now ask what circumstance there is in the constitution of the House of Representatives that violates the principles of republican government or favors the elevation of the few on the ruins of the many? Let me ask whether every circumstance is not, on the contrary, strictly conformable to these principles and scrupulously impartial to the rights and pretensions of every class and description of citizens?

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[1] [The first two charges are, "first, that so small a number of representatives will be an unsafe depositary of the public interests; secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents;" These charges are discussed and refuted in the Papers 55 and 56, respectively.]

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

If we consider the situation of the men on whom the free suffrages of their fellow citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.

In the first place, as they will have been distinguished by the preference of their fellow citizens, we are to presume that in general they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.

In the second place, they will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature, and it must be confessed that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires is itself a proof of the energy and prevalence of the contrary sentiment.

In the third place, those ties which bind the representative to his constituents are strengthened by motives of a more selfish nature. His pride and vanity attach him to a form of government which favors his pretensions and gives him a share in its honors and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen that a great proportion of the men deriving their advancement from their influence with the people would have more to hope from a preservation of the favor than from innovations in the government subversive of the authority of the people.

All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, in the fourth place, the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised—there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples, but without which every government degenerates into tyranny. If it be asked what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system, the nature of just and constitutional laws, and above all the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself are the chords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of man. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine and the characteristic means by which republican government provides for the liberty and happiness of the people? Are they not the identical means on which every State government in the Union relies for the attainment of these important ends? What then are we to understand by the objection which this paper has combated? What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them?

Were the objection to be read by one who had not seen the mode prescribed by the Constitution for the choice of representatives, he could suppose nothing less than that some unreasonable qualification of property was annexed to the right of suffrage; or that the right of eligibility was limited to persons of particular families or fortunes; or at least that the mode prescribed by the State constitutions was in some respect or other very grossly departed from. We have seen how far such a supposition would err as to the two first points. Nor would it, in fact, be less erroneous as to the last. The only difference discoverable between the two cases is that each representative of the United States will be elected by five or six thousand citizens, whilst in the individual States the election of a representative is left to about as many hundreds. Will it be pretended that this difference is sufficient to justify an attachment to the State governments and an abhorrence to the federal government? If this be the point on which the objection turns, it deserves to be examined.

Is it supported by *reason?* This cannot be said without maintaining that five or six thousand citizens are less capable of choosing a fit representative, or more liable to be corrupted by an unfit one, than five or six hundred. Reason, on the contrary, assures us that as in so great a number a fit representative would be most likely to be found, so the choice would be less likely to be diverted from him by the intrigues of the ambitious or the bribes of the rich. . . . [No. 57]

## 2. THE SENATE

MADISON:

Having examined the constitution of the House of Representatives, and answered such of the objections against it as seemed to merit notice, I enter next on the examination of the Senate.

The heads into which this member of the government may be considered are: I. The qualifications of senators;

II. The appointment of them by the State legislatures; III. The equality of representation in the Senate; IV. The number of senators, and the term for which they are to be elected; V. The powers vested in the Senate.

I. The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship. A senator must be thirty years of age at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages, and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

II. It is equally unnecessary to dilate on the appointment of senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the Convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former and may form a convenient link between the two systems.

III. The equality of representation in the Senate is an other point, which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation every district ought to have a *proportional* share in the government, and that among independent and sovereign States bound together by a simple league the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable."[1] A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America. A government founded on principles more consonant to the wishes of the larger States is not likely to be obtained from the smaller States. The only option, then, for the former lies between the proposed government and a government still more objectionable. Under this alternative the advice of prudence must be to embrace the lesser evil and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

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[1] [Quoted from George Washington's letter of September 17, 1787, to the Congress, reporting on the deliberations of the Convention and submitting the Constitution. Reprinted in *From the Declaration of Independence to the Constitution*, edited by Carl J. Friedrich and Robert G. McCloskey, "The American Heritage Series," No. 6, (New York: The Liberal Arts Press, Inc.), pp. 45-46.]

In this spirit it may be remarked that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States, since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people and, then, of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial, and that the peculiar defense which it involves in favor of the smaller States would be more rational if any interests common to them and distinct from those of the other States would otherwise be exposed to peculiar danger. But as the larger States will always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative of the lesser States, and as the facility and excess of lawmaking seem to be the diseases to which our governments are most liable, it is not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation.

IV. The number of senators and the duration of their appointment come next to be considered. In order to form an accurate judgment on both these points it will be proper to inquire into the purposes which are to be answered by a senate; and in order to ascertain these it will be necessary to review the inconveniences which a republic must suffer from the want of such an institution.

*First.* It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark that, as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures and with the genuine principles of republican government.

*Secondly.* The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number, and from proceedings within the United States as well as from the history of other nations. But a position that will not be contradicted need not be proved. All that need be remarked is that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

*Thirdly.* Another defect to be supplied by a senate lies n a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments, and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom, so many impeachments exhibited by each succeeding against each preceding session, so many admonitions to the people of the value of those aids which may be expected from a well-constituted senate?

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities, most governments are deficient in the first. I scruple not to assert that in American governments too little attention has been paid to the last. The federal Constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first.

*Fourthly.* The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life and becomes more just, as well as more important, in national transactions. . . . [No. 62]

MADISON:

A *fifth* desideratum illustrating the utility of a senate is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned, but the national councils will not possess that sensibility to the opinion of the world which is perhaps not less necessary in order to merit than it is to obtain its respect and confidence.

An attention to the judgment of other nations is important to every government for two reasons: the one is that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations, and how many errors and follies would she not have avoided if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?

Yet, however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual, or in an assembly so durably invested with public trust that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community. The half-yearly representatives of Rhode Island would probably have been little affected in their deliberations on the iniquitous measures of that State by arguments drawn from the light in which such measures would be viewed by foreign nations or even by the sister States, whilst it can scarcely be doubted that if the concurrence of a select and stable body had been necessary, a regard to national character alone would have prevented the calamities under which that misguided people is now laboring.

I add as a *sixth* defect the want, in some important cases, of a due responsibility in the government to the people, arising from that frequency of elections which in other cases produces this responsibility. This remark will, perhaps, appear not only new but paradoxical. It must nevertheless be acknowledged, when explained, to be as undeniable as it is important.

Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party, and in order to be effectual, must relate to operations of that power of which a ready and proper judgment can be formed by the constituents. The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation, the other depending on a succession of well-chosen and well-connected measures which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the *share* of influence which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult to preserve a personal responsibility in the members of a *numerous* body for such acts of the body as have an immediate, detached, and palpable operation on its constituents.

The proper remedy for this defect must be an additional body in the legislative department which, having sufficient permanency to provide for such objects as require a continued attention and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Thus far I have considered the circumstances which point out the necessity of a well-constructed Senate only as they relate to the representatives of the people. To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought in all governments, and actually will in all free governments, ultimately prevail over the views of its rulers, so there are particular moments in public affairs when the people, stimulated by some irregular passion or some illicit advantage or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.

It may be suggested that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show that it is one of the principal recommendations of a confederated republic. At the same time, this advantage ought not to be considered as superseding the use of auxiliary precautions. It may even be remarked that the same extended situation which will exempt the people of America from some of the dangers incident to lesser republics will expose them to the inconvenience of remaining for a longer time under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them. . . . [No. 63]

JAY:

It is a just and not a new observation that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed Constitution in the aggregate and treat with severity some of the most unexceptionable articles in it.

The second section gives power to the President: "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur."

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode and with such precautions as will afford the highest security that it will be exercised by men the best qualified for the purpose and in the manner most conducive to the public good. The Convention appears to have been attentive to both these points: they have directed the President to be chosen by select bodies of electors to be deputed by the people for that express purpose; and they have committed the appointment of senators to the State legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking the advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.

As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded that wise kings will always be served by able ministers, it is fair to argue that as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment. The inference which naturally results from these considerations is this that the President and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Although the absolute necessity of system, in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly composed of members constantly coming and going in quick succession seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the Convention to provide not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns and to form and introduce a system for the management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political information and of rendering their accumulating experience more and more beneficial to their country. Nor has the Convention discovered less prudence in providing for the frequent elections of senators in such a way as to obviate the inconvenience of periodically transferring those great affairs entirely to new men; for by leaving a considerable residue of the old ones in place, uniformity and order as well as a constant succession of official information will be preserved.

There are a few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued, and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained; and they who assent to the truth of this position will see and confess that it is well provided for by making concurrence of the Senate necessary both to treaties and to laws.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite. These are cases where the most useful intelligence may be obtained if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate and still less in that of a large popular assembly. The Convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men must have perceived that there are tides in them—tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us that there frequently are occasions when days, nay, even when hours are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and despatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most despatch are those preparatory and auxiliary measures which are not otherwise important in a national view than as they tend to facilitate the attainment of the objects of the negotiation. For these the President will find no difficulty to provide, and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and despatch on the other.

But to this plan, as to most others that have ever appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow that because they have given the power of making laws to the legislature that, therefore, they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties like acts of assembly should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which should be binding on them *absolutely,* but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them, but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period or under any form of government.

However useful jealousy may be in republics, yet when, like bile in the natural, it abounds too much in the body politic, the eyes of both become very liable to be deceived by the delusive appearances which that malady casts on surrounding objects. From this cause, probably, proceed the fears and apprehensions of some that the President and Senate may make treaties without an equal eye to the interests of all the States. Others suspect that two thirds will oppress the remaining third and ask whether those gentlemen are made sufficiently responsible for their conduct—whether, if they act corruptly, they can be punished; and if they make disadvantageous treaties, how are we to get rid of those treaties?

As all the States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons and to insist on their punctual attendance. In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more an object of attention, and the government must be a weak one indeed if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole. It will not be in the power of the President and Senate to make any treaties by which they and their families and estates will not be equally bound and affected with the rest of the community, and having no private interests distinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the case is not supposable. He must either have been very unfortunate in his intercourse with the world or possess a heart very susceptible of such impressions, who can think it probable that the President and two thirds of the Senate will ever be capable of such unworthy conduct. The idea is too gross and too invidious to be entertained. But in such a case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations.

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor, oaths, reputations, conscience, the love of country, and family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken the utmost care that they shall be men of talents and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments. [No. 64]

HAMILTON:

The remaining powers which the plan of the Convention allots to the Senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments. As in the business of appointments the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will, therefore, conclude this head with a view of the judicial character of the Senate.

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated "political," as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.

The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves. The difficulty of placing it rightly in a government resting entirely on the basis of periodical elections will as readily be perceived when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders or the tools of the most cunning or the most numerous faction, and, on this account, can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

The Convention, it appears, thought the Senate the most fit depositary of this important trust. Those who can best discern the intrinsic difficulty of the thing will be least hasty in condemning that opinion and will be most inclined to allow due weight to the arguments which may be supposed to have produced it.

What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of "national inquest" into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? The model from which the idea of this institution has been borrowed pointed out that course to the Convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter as the former seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

Where else than in the Senate could have been found a tribunal sufficiently dignified or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused and the *representatives of the people,* his accusers?

Could the Supreme Court have been relied upon as answering this description? It is much to be doubted whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task; and it is still more to be doubted whether they would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have—to doom to honor or to infamy the most confidential and the most distinguished characters of the community—forbids the commitment of the trust to a small number of persons.

These considerations seem alone sufficient to authorize a conclusion that the Supreme Court would have been an improper substitute for the Senate as a court of impeachments. There remains a further consideration which will not a little strengthen this conclusion. It is this: The punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame and his most valuable rights as a citizen in one trial should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature will not hesitate to answer these questions in the affirmative and will be at no loss to perceive that, by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismission from a present, and disqualification for a future, office. It may be said that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt? . . . [No. 65]

K. Doddanna
C.T.A

# PART FIVE
# THE EXECUTIVE BRANCH

## 1. GENERAL NATURE OF THE EXECUTIVE

**HAMILTON:**

The constitution of the executive department of the proposed government claims next our attention.

There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticized with less judgment.

Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States, not merely as the embryo but as the full-grown progeny of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

Attempts so extravagant as these to disfigure or, it might rather be said, to metamorphose the object render it necessary to take an accurate view of its real nature and form, in order as well to ascertain its true aspect and genuine appearance as to unmask the disingenuity and expose the fallacy of the counterfeit resemblances which have been so insidiously, as well as industriously, propagated.

In the execution of this task there is no man who would not find it an arduous effort either to behold with moderation or to treat with seriousness the devices, not less weak than wicked, which have been contrived to pervert the public opinion in relation to the subject. They so far exceed the usual though unjustifiable licenses of party artifice that even in a disposition the most candid and tolerant they must force the sentiments which favor an indulgent construction of the conduct of political adversaries to give place to a voluntary and unreserved indignation. It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense of a similitude between a king of Great Britain and a magistrate of the character marked out for that of the President of the United States. It is still more impossible to withhold that imputation from the rash and barefaced expedients which have been employed to give success to the attempted imposition.

In one instance, which I cite as a sample of the general spirit, the temerity has proceeded so far as to ascribe to the President of the United States a power which by the instrument reported is *expressly* allotted to the Executives of the individual States. I mean the power of filling casual vacancies in the Senate.

This bold experiment upon the discernment of his countrymen has been hazarded by a writer who (whatever may be his real merit) has had no inconsiderable share in the applauses of his party,[1] and who, upon this false and unfounded suggestion, has built a series of observations equally false and unfounded. Let him now be confronted with the evidence of the fact, and let him, if he be able, justify or extenuate the shameful outrage he has offered to the dictates of truth and to the rules of fair dealing.

The second clause of the second section of the Second Article empowers the President of the United States—

> to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other *officers* of the United States whose appointments are *not* in the Constitution *otherwise provided for,* and *which shall be established by law.*

Immediately after this clause follows another in these words:

> The President shall have power to fill up all *vacancies* that may happen *during the recess of the Senate,* by granting commissions which shall *expire at the end of their next session.*

It is from this last provision that the pretended power of the President to fill vacancies in the Senate has been deduced. A slight attention to the connection of the clauses and to the obvious meaning of the terms will satisfy us that the deduction is not even colorable.

The first of these two clauses, it is clear, only provides a mode for appointing such officers, "whose appointments are *not otherwise provided for* in the Constitution, and which *shall be established by law"*; of course, it cannot extend to the appointments of senators, whose appointments are "otherwise provided for" in the Constitution [2] and who are "established by the Constitution," and will not require a future establishment by law. This position will hardly be contested.

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[1] See Cato, No. V. [Pseudonym commonly ascribed to George Clinton (1739-1812); Governor of New York from 1777 to 1795; Vice President of the United States from 1805 to 1812. Clinton was a leading anti-Federalist who wrote under the pseudonym "Cato" a number of essays against the adoption of the Constitution, which were answered by Hamilton under the pseudonym "Caesar." Cf. P. L. Ford, *Essays on the Constitution* (Brooklyn, 1892), especially p. 245.]

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the Senate, for the following reasons:

*First*. The relation in which that clause stands to the other which declares the general mode of appointing officers of the United States denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate *jointly* and can, therefore, only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess* which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly,* to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

*Secondly*. If this clause is to be considered as supplementary to the one which precedes, the "vacancies" of which it speaks must be construed to relate to the "officers" described in the preceding one; and this, we have seen, excludes from its description the members of the Senate.

*Thirdly*. The time within which the power is to operate "during the recess of the Senate" and the duration of the appointments "to the end of the next session" of that body conspire to elucidate the sense of the provision, which, if it had been intended to comprehend senators, would naturally have referred the temporary power of filling vacancies to the recess of the State legislatures, who are to make the permanent appointments, and not to the recess of the national Senate, who are to have no concern in those appointments; and would have extended the duration in office of the temporary senators to the next session of the legislature of the State in whose representation the vacancies had happened, instead of making it to expire at the end of the ensuing session of the national Senate. The circumstances of the body authorized to make the permanent appointments would, of course, have governed the modification of a power which related to the temporary appointments; and as the national Senate is the body whose situation is alone contemplated in the clause upon which the suggestion under examination has been founded, the vacancies to which it alludes can only be deemed to respect those officers in whose appointment that body has a concurrent agency with the President. But *lastly*, the first and second clauses of the third section of the First Article not only obviate all possibility of doubt but destroy the pretext of misconception. The former provides that "the Senate of the United States shall be composed of two Senators from each State, chosen *by the legislature thereof* for six years"; and the latter directs that, "if vacancies in that body should happen by resignation or otherwise, *during the recess of the legislature of any State,* the Executive *thereof* may make temporary appointments until the *next meeting of the legislature,* which shall then fill such vacancies." Here is an express power given, in clear and unambiguous terms, to the State Executives to fill casual vacancies in the Senate by temporary appointments; which not only invalidates the supposition that the clause before considered could have been intended to confer that power upon the President of the United States, but proves that this suppoition, destitute as it is even of the merit of plausibility, nust have originated in an intention to deceive the people, oo palpable to be obscured by sophistry, too atrocious to e palliated by hypocrisy.

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[2] [Article I, section 3, clause 1.]

I have taken the pains to select this instance of misrepresentation and to place it in a clear and strong light as an unequivocal proof of the unwarrantable arts which are practiced to prevent a fair and impartial judgment of the real merits of the Constitution submitted to the consideration of the people. Nor have I scrupled, in so flagrant a case, to allow myself a severity of animadversion little congenial with the general spirit of these papers. I hesitate not to submit it to the decision of any candid and honest adversary of the proposed government whether language can furnish epithets of too much asperity for so shameless and so prostitute an attempt to impose on the citizens of America. [No. 67]

HAMILTON:

I proceed now to trace the real characters of the proposed Executive, as they are marked out in the plan of the Convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for *four* years, and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence.[3] In these circumstances there is a total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between *him* and a governor of New York, who is elected for *three* years and is re-eligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State than for establishing a like influence throughout the United States, we must conclude that a duration of *four* years for the chief magistrate of the Union is a degree of permanency far less to be dreaded in that office than a duration of *three* years for a corresponding office in a single State.

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office, and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable, no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great

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[3] [Amendment XXII of March 1, 1951, now provides that "no person shall be elected to the office of the President more than twice" (Section 1).]

Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence, and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign and tallies exactly with the revisionary authority of the Council of Revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the Convention have copied.

The President is to be—

> the commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the United States, *except in cases of impeachment;* to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them *with respect to the time of adjournment,* to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States.[4]

In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:

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[4] [ Article II, section 2.]

*First.* The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this Article, therefore, the power of the President would be inferior to that of either the monarch or the governor.

*Secondly.* The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy, while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.[5] The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief as well of the army as navy; and t may well be a question whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors than could be claimed by a President of the United States.

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[5] A writer in a Pennsylvania paper, under the signature of TAMONY, has asserted that the king of Great Britain owes his prerogative as commander-in-chief to an annual mutiny bill. The truth is, on the contrary, that his prerogative, in this respect, is immemorial, and was only disputed, "contrary to all reason and precedent," as Blackstone [*Commentaries*], I, 262, expresses it, by the Long Parliament of Charles I, but by the statute the 13th of Charles II, chap. 6, it was declared to be in the king alone, for that the sole supreme government and command of the militia within his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, *ever was and is* the undoubted right of his Majesty and his royal predecessors, kings and queens of England, and that both or either house of Parliament cannot nor ought to pretend to the same.

*Thirdly*. The power of the President, in respect to pardons, would extend to all cases *except those of impeachment*. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government which have not been matured into actual treason may be screened from punishment of every kind by the interposition of the prerogative of pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty than the mere prospect of an exemption from death and confiscation if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all when the probability was computed that the person who was to afford that exemption might himself be involved in the consequences of the measure and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect that, by the proposed Constitution, the offense of treason is limited "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort"; and that by the laws of New York it is confined within similar bounds.

*Fourthly.* The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time—a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated that his authority in this respect is not conclusive and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of until it was broached upon the present occasion. Every jurist[6] of that kingdom, and every other man acquainted with its Constitution, knows as an established fact that the prerogative of making treaties exists in the crown in its utmost plenitude, and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty, and this may have possibly given birth to the imagination that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws to the changes made in them by the operation of the treaty, and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature. It must be admitted that, in this instance, the power of the federal executive would exceed that of any state executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question whether the executives of the several States were not solely invested with that delicate and important prerogative.

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[6] *Vide* Blackstone, [*op. cit.*], I, 257.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate, and, *with the advice and consent of the Senate,* to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure, and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king, nor is it equal to that of the governor of New York if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council composed of the governor and four members of the Senate chosen by the Assembly. The governor *claims,* and has frequently *exercised,* the right of nomination, and is *entitled* to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale and confirm his own nomination.[7] If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four and frequently with only two persons, and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists than the considerable number of which the national Senate would consist, we cannot hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must, in practice, be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally that there is no pretense for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

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[7] Candor, however, demands an acknowledgment that I do not think the claim of the governor to a right of nomination well founded. Yet it is always justifiable to reason from the practice of a government, till its propriety has been constitutionally questioned. And independent of this claim, when we take into view the other considerations and pursue them through all their consequences, we shall be inclined to draw much the same conclusion.

The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace, the person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body, the other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation, the other, in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties, the other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices, the other is the sole author of all appointments. The one can confer no privileges whatever, the other can make denizens of aliens, noblemen of commoners, can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation, the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction, the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government the whole power of which would be in the hands of the elective and periodical servants of the people is an aristocracy, a monarchy, and a despotism. [No. 69]

HAMILTON:

. . . Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the Convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number;

and in proportion as the number is increased, these qualities will be diminished. . . .

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office in which they are clothed with equal dignity and authority, there is a peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy. . . . [No. 70]

HAMILTON:

Duration in office has been mentioned as the second requisite to the energy of the executive authority. This has relation to two objects: to the personal firmness of the executive magistrate in the employment of his constitutional powers, and to the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it must be evident that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature that a man will be interested in whatever he possesses in proportion to the firmness or precariousness of the tenure by which he holds it, will be less attached to what he holds by a momentary or uncertain title than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one than for the sake of the other. This remark is not less applicable to a political privilege, or honor, or trust than to any article of ordinary property. The inference from it is that a man, acting in the capacity of chief magistrate under a consciousness that in a very short time he *must* lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity from the independent exertion of his powers or from encountering the ill humors, however transient, which may happen to prevail either in a considerable part of the society itself or even in a predominant faction in the legislative body. If the case should only be that he *might* lay it down unless continued by a new choice, and if he should be desirous of being continued, his wishes, conspiring with his fears, would tend still more powerfully to corrupt his integrity or debase his fortitude. In either case, feebleness and irresolution must be the characteristics of the station.

There are some who would be inclined to regard the servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions as well of the purposes for which government was instituted as of the true means by which the public happiness may be promoted. The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs, but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men who flatter their prejudices to betray their interests. It is a just observation that the people commonly *intend* the *public good*. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

But however inclined we might be to insist upon an unbounded complaisance in the Executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the legislature. The latter may sometimes stand in opposition to the former, and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision.

The same rule which teaches the propriety of a partition between the various branches of power teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal and incapable of producing the ends for which it was established. It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government, and, whatever may be the forms of the Constitution, unites all power in the same hands. The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter, as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.

It may perhaps be asked how the shortness of the duration in office can affect the independence of the Executive on the legislature, unless the one were possessed of the power of appointing or displacing the other. One answer to this inquiry may be drawn from the principle already remarked—that is, from the slender interest a man is apt to take in a short-lived advantage, and the little inducement it affords him to expose himself, on account of it, to any considerable inconvenience or hazard. Another answer, perhaps more obvious though not more conclusive, will result from the consideration of the influence of the legislative body over the people, which might be employed to prevent the re-election of a man who, by an upright resistance to any sinister project of that body, should have made himself obnoxious to its resentment.

It may be asked, also, whether a duration of four years would answer the end proposed; and if it would not, whether a less period, which would at least be recommended by greater security against ambitious designs, would not, for that reason, be preferable to a longer period, which was, at the same time, too short for the purpose of inspiring the desired firmness and independence of the magistrate.

It cannot be affirmed that a duration of four years, or any other limited duration, would completely answer the end proposed, but it would contribute towards it in a degree which would have a material influence upon the spirit and character of the government. Between the commencement and termination of such a period, there would always be a considerable interval in which the prospect of annihilation would be sufficiently remote, not to have an improper effect upon the conduct of a man indued with a tolerable portion of fortitude, and in which he might reasonably promise himself that there would be time enough before it arrived to make the community sensible of the propriety of the measures he might incline to pursue. Though it be probable that, as he approached the moment when the public were, by a new election, to signify their sense of his conduct, his confidence, and with it his firmness, would decline, yet both the one and the other would derive support from the opportunities which his previous continuance in the station had afforded him of establishing himself in the esteem and good will of his constituents. He might, then, hazard with safety, in proportion to the proofs he had given of his wisdom and integrity, and to the title he had acquired to the respect and attachment of his fellow citizens. As, on the one hand, a duration of four years will contribute to the firmness of the Executive in a sufficient degree to render it a very valuable ingredient in the composition, so, on the other, it is not enough to justify any alarm for the public liberty. If a British House of Commons, from the most feeble beginnings, *from the mere power of assenting or disagreeing to* *the imposition of a new tax,* have, by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government, while they raised themselves to the rank and consequence of a coequal branch of the legislature; if they have been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments as well in the Church as State; if they have been able, on a recent occasion, to make the monarch tremble at the prospect of an innovation attempted by them, what would be to be feared from an elective magistrate of four years' duration with the confined authorities of a President of the United States? What but that he might be unequal to the task which the Constitution assigns him? I shall only add that if his duration be such as to leave a doubt of his firmness, that doubt is inconsistent with a jealousy of his encroachments. [No. 71]

## 2. THE PRESIDENT'S VETO POWER

**HAMILTON:**

The third ingredient towards constituting the vigor of the executive authority is an adequate provision for its support. It is evident that without proper attention to this article the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine or tempt him by largesses to surrender at discretion his judgment to their inclinations. These expressions, taken in all the latitude of the terms, would no doubt convey more than is intended. There are men who could neither be distressed nor won into a sacrifice of their duty, but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man's support is a power over his will. If it were necessary to confirm so plain a truth by facts, examples would not be wanting, even in this country, of the intimidation or seduction of the Executive by the terrors or allurements of the pecuniary arrangements of the legislative body.

It is not easy, therefore, to commend too highly the judicious attention which has been paid to this subject in the proposed Constitution. It is there provided that—

> the President of the United States shall, at stated times, receive for his services a compensation which *shall neither be increased nor diminished during the period for which he shall have been elected;* and he *shall not receive within that period any other emolument* from the United States, or any of them.[1]

It is impossible to imagine any provision which would have been more eligible than this. The legislature, on the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.

The last of the requisites to energy, which have been enumerated, are competent powers. Let us proceed to consider those which are proposed to be vested in the President of the United States.

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[1] [Article II, section 1, clause 7.]

The first thing that offers itself to our observation is the qualified negative of the President upon the acts or resolutions of the two houses of the legislature or, in other words, his power of returning all bills with objections, to have the effect of preventing their becoming laws unless they should afterwards be ratified by two thirds of each of the component members of the legislative body.

The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.

But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of ction, precipitancy, or of any impulse unfriendly to the ublic good, which may happen to influence a majority of hat body.

The propriety of a negative has, upon some occasions, een combated by an observation that it was not to be preumed a single man would possess more virtue and wisdom han a number of men, and that unless this presumption hould be entertained, it would be improper to give the xecutive magistrate any species of control over the legisative body.

But this observation, when examined, will appear rather pecious than solid. The propriety of the thing does not urn upon the supposition of superior wisdom or virtue in he Executive, but upon the supposition that the legislaure will not be infallible, that the love of power may sometimes betray it into a disposition to encroach upon the ights of other members of the government, that a spirit of faction may sometimes pervert its deliberation, that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn. The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them. . . .

But the Convention have pursued a mean in this business which will both facilitate the exercise of the power vested in this respect in the executive magistrate and make its efficacy to depend on the sense of a considerable part of the legislative body. Instead of an absolute negative, it is proposed to give the Executive the qualified negative already described. This is a power which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single *veto* might not scruple to return it for reconsideration, subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason it may in practice be found more effectual. It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time, and this, too, in spite of the counterposing weight of the Executive. It is at any rate far less probable that this should be the case than that such views should taint the resolutions and conduct of a bare majority. A power of this nature in the Executive will often have a silent and unperceived, though forcible, operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition from doing what they would with eagerness rush into if no such external impediments were to be feared. . . . [No. 73]

**HAMILTON:**

The President is to have power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur."

Though this provision has been assailed, on different grounds, with no small degree of vehemence, I scruple not to declare my firm persuasion that it is one of the best digested and most unexceptionable parts of the plan. One ground of objection is the trite topic of the intermixture of powers—some contending that the President ought alone to possess the power of making treaties, others, that it ought to have been exclusively deposited in the Senate. Another source of objection is derived from the small number of persons by whom a treaty may be made. On those who espouse this objection, a part are of the opinion that the House of Representatives ought to have been associated in the business, while another part seem to think that nothing more was necessary than to have substituted two thirds of *all* the members of the Senate, to two thirds of the members *present*. As I flatter myself the observations made in a preceding number upon this part of the plan must have sufficed to place it, to a discerning eye, in a very favorable light, I shall here content myself with offering only some supplementary remarks, principally with a view to the objections which have been just stated.

With regard to the intermixture of powers, I shall rely upon the explanations already given in other places, of the true sense of the rule upon which that objection is founded, and shall take it for granted, as an inference from them, that the union of the Executive with the Senate, in the article of treaties, is no infringement of that rule. I venture to add that the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition, for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones, and still less to an exertion of the common strength. Its objects are *contracts* with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the Executive as the most fit agent in those transactions, while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years' duration. It has been remarked, upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often the oppressor of his people, has personally too much stake in the government to be in any material danger of being corrupted by foreign powers. But a man raised from the station of a private citizen to the rank of chief magistrate, possessed of a moderate or slender fortune and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

To have entrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity, but they would also have the option of letting it alone, and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive. Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question by the President and Senate would afford a greater prospect of security than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a President will be satisfied that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom as on that of integrity.

The remarks made in a former number, which have been alluded to in another part of this paper, will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties. The fluctuating and, taking its future increase into the account, the multitudinous composition of that body forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics, a steady and systematic adherence to the same views, a nice and uniform sensibility to national character, decision, *secrecy*, and despatch are incompatible with the genius of a body so variable and so numerous. The very complication of the business by introducing a necessity of the concurrence of so many different bodies would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.

The only objection which remains to be canvassed is that which would substitute the proportion of two thirds of all the members composing the senatorial body to that of two thirds of the members *present*. It has been shown, under the second head of our inquiries, that all provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion that the Convention have gone as far in the endeavor to secure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils or with a reasonable regard to the major sense of the community. If two thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman Tribuneship, the Polish Diet, and the States-General of the Netherlands, did not an example at home render foreign precedents unnecessary. . . . [No. 75]

## 3. THE APPOINTING POWER

**HAMILTON:**

. . . The President is to

*nominate,* and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution. But the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, or in the courts of law, or in the heads of departments. The President shall have power to fill up *all vacancies* which may happen *during the recess of the Senate,* by granting commissions which shall *expire* at the end of their next session. [Article II, section 2, clauses 2 and 3.]

It has been observed in a former paper that "the true test of a good government is its aptitude and tendency to produce a good administration." If the justness of this observation be admitted, the mode of appointing the officers of the United States contained in the foregoing clauses must, when examined, be allowed to be entitled to particular commendation. It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union, and it will not need proof that on this point must essentially depend the character of its administration. . . .

To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation and, in the case of an elective magistrate, to his political existence from betraying a spirit of favoritism or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure. . . . [No. 76]

HAMILTON:

. . . We have now completed a survey of the structure and powers of the executive department, which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense—a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics and is satisfactorily deducible from these circumstances: from the election of the President once in four years by persons immediately chosen by the people for that purpose, and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the Convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people? [No. 77]

## PART SIX

# THE JUDICIAL BRANCH

## 1. THE NATURE AND POWERS OF THE FEDERAL JUDICIARY

**HAMILTON:**

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: *First,* the mode of appointing the judges. *Secondly,* the tenure by which they are to hold their places. *Thirdly,* the partition of the judiciary authority between different courts and their relations to each other.

*First.* As to the mode of appointing the judges, this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers that nothing can be said here which would not be useless repetition.

*Secondly.* As to the tenure by which the judges are to hold their places, this chiefly concerns their duration in office, the provisions for their support, the precautions for their responsibility.

According to the plan of the Convention all judges who may be appointed by the United States are to hold their offices *during good behavior,* which is conformable to the most approved of the State constitutions and, among the rest, to that of this State. Its propriety, having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither *force* nor *will,* but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power,[1] that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." [2] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare l acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights r privileges would amount to nothing.

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[1] The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing."—*Spirit of Laws*, I, 186.

[2] [*Ibid.*, I, 181.]

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is above his master, that the representatives of the people are superior to the people themselves, that men acting by virtue of powers may do not only what their powers do not authorize but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative ovision, but adopted by themselves, as consonant to truth d propriety, for the direction of their conduct as inter- eters of the law. They thought it reasonable that be- een the interfering acts of an *equal* authority that which s the last indication of its will should have the pref- nce.

But in regard to the interfering acts of a superior and bordinate authority, of an original and derivative power, e nature and reason of the thing indicate the converse that rule as proper to be followed. They teach us that e prior act of a superior ought to be preferred to the sub- quent act of an inferior and subordinate authority, and at accordingly, whenever a particular statute contravenes e Constitution, it will be the duty of the judicial tribu- ls to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pre- nse of a repugnancy, may substitute their own pleasure the constitutional intentions of the legislature. This ight as well happen in the case of two contradictory atutes, or it might as well happen in every adjudication on any single statute. The courts must declare the sense the law; and if they should be disposed to exercise *will* stead of *judgment,* the consequence would equally be e substitution of their pleasure to that of the legislative ody. The observation, if it prove anything, would prove at there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the ulwarks of a limited constitution against legislative en- oachments, this consideration will afford a strong argu- ent for the permanent tenure of judicial offices, since othing will contribute so much as this to that independent irit in the judges which must be essential to the faithful erformance of so arduous a duty.

This independence of the judges is equally requisite to uard the Constitution and the rights of individuals from e effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies,[3] in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions, or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge, of their sentiments can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther

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[3] *Vide* "Protest of the Minority of the Convention of Pennsylvania," Martin's Speech, etc.

han to the injury of the private rights of particular classes
f citizens by unjust and partial laws. Here also the firm-
ess of the judicial magistracy is of vast importance in
nitigating the severity and confining the operation of such
aws. It not only serves to moderate the immediate mis-
hiefs of those which may have been passed, but it operates
s a check upon the legislative body in passing them; who,
erceiving that obstacles to the success of iniquitous in-
ention are to be expected from the scruples of the courts,
re in a manner compelled, by the very motives of the in-
ustice they meditate, to qualify their attempts. This is a
ircumstance calculated to have more influence upon the
haracter of our governments than but few may be aware
f. The benefits of the integrity and moderation of the
udiciary have already been felt in more States than one;
nd though they may have displeased those whose sinister
xpectations they may have disappointed, they must have
ommanded the esteem and applause of all the virtuous and
isinterested. Considerate men of every description ought
o prize whatever will tend to beget or fortify that temper
n the courts, as no man can be sure that he may not be
omorrow the victim of a spirit of injustice by which he
nay be a gainer today. And every man must now feel that
he inevitable tendency of such a spirit is to sap the foun-
ations of public and private confidence and to introduce
n its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of
he Constitution, and of individuals, which we perceive to
e indispensable in the courts of justice, can certainly not
e expected from judges who hold their offices by a tem-
orary commission. Periodical appointments, however regu-
ated, or by whomsoever made, would, in some way or
ther, be fatal to their necessary independence. If the power
f making them was committed either to the Executive or
gislature, there would be danger of an improper com-
laisance to the branch which possessed it; if to both, there

would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, th number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no grea option between fit characters, and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accep a seat on the bench, would have a tendency to throw th administration of justice into hands less able and les qualified to conduct it with utility and dignity. In th present circumstances of this country, and in those in whic it is likely to be for a long time to come, the disadvantag on this score would be greater than they may at first sig appear, but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole there can be no room to doubt that the Convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial offices, in point of duration, and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution. [No. 78]

HAMILTON:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent*[4] salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the Convention accordingly has provided that the judges of the United States "shall at *stated times* receive for their

[4] *Vide* "Constitution of Massachusetts," Chapter II, section 1, article 13.

services a compensation which shall not be *diminished* during their continuance in office."

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the Convention between the compensation of the President and of the judges—that of the former can neither be increased nor diminished, that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, i can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be suc to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, i may well happen, especially in the early stages of the government, that a stipend which would be very sufficient a their first appointment would become too small in th progress of their service.

This provision for the support of the judges bears eve mark of prudence and efficacy, and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character and is the only one which we find in our own Constitution in respect to our own judges. . . . [No. 79]

HAMILTON:

. . . It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend to these several descriptions of cases: *first,* to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; *secondly,* to all those which concern the execution of the provisions expressly contained in the articles of Union; *thirdly,* to all those in which the United States are a party; *fourthly,* to all those which involve the *peace* of the *Confederacy,* whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves; *fifthly,* to all those which originate on the high seas and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The first point depends upon this obvious consideration that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures without some constitutional mode of enforcing the observance of them? The States, by the plan c the Convention, are prohibited from doing a variety c things, some of which are incompatible with the interest of the Union, and others with the principles of good government. The imposition of duties on imported article and the emission of paper money are specimens of eac kind. No man of sense will believe that such prohibition would be scrupulously regarded without some effectua power in the government to restrain or correct the infra tions of them. This power must either be a direct negativ on the State laws or an authority in the federal courts t overrule such as might be in manifest contravention of th articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the Convention preferable to the former, and I presume will b most agreeable to the States.

As to the second point, it is impossible, by any argumen or comment, to make it clearer than it is in itself. If ther are such things as political axioms, the propriety of th judicial power of a government, being coextensive with it legislative, may be ranked among the number. The mer necessity of uniformity in the interpretation of the nationa laws decides the question. Thirteen independent courts o final jurisdiction over the same causes arising upon th same laws is a hydra in government from which nothing bu contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizen can only be properly referred to the national tribunals. Another plan would be contrary to reason, to precedent, an to decorum.

The fourth point rests on this plain proposition that th peace of the *whole* ought not to be left at the disposal of *part*. The Union will undoubtedly be answerable to fo eign powers for the conduct of its members. And the r sponsibility for an injury ought ever to be accompanie with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity. A distinction may, perhaps, be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci,* would not, if unredressed, be an aggression upon his sovereign as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century, and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the States under the authority of the federal head was not unattended to even in the imperfect system by which they have been hitherto held together. But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States.[5] And though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control.

It may be esteemed the basis of the Union that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority,* it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

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[5] [The reference is here probably to the so-called "stay-laws" and "tender-laws" which were enacted by several States to protect the debtors. "Stay-laws" were designed to prevent or postpone the foreclosure of mortgages; "tender-laws" made it obligatory for the creditor to accept produce in payment of debts. These laws worked in turn hardship on the merchants and manufacturers and were strongly opposed by these groups.]

The fifth point will demand little animadversion. The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are by the present Confederation submitted to federal jurisdiction.

The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government. . . . [No. 80]

HAMILTON:

. . . The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction both as to law and fact in all the cases referred to them, both subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does in no case *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary without exposing us to any of the inconveniences which have been predicted from that source. [No. 81]

## 2. FEDERAL COURTS AND STATE COURTS

HAMILTON:

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent *whole.*

Such questions, accordingly, have arisen upon the plan proposed by the Convention, and particularly concerning the judiciary department. The principal of these respect the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction. Is this to be exclusive or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly entitled to attention.

The principles established in a former paper[1] teach us that the States will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head, and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union, or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States, or where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as the latter. And under this impression I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed Constitution which wears the appearance of confining the causes of federal cognizance to the federal courts is contained in this passage:

> The *judicial power* of the United States *shall be vested* in one Supreme Court, and in *such* inferior courts as the Congress shall from time to time ordain and establish.[2]

This might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend, or simply to denote that the organs of the national judiciary should be one Supreme Court and as many subordinate courts as Congress should think proper to appoint, or in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal and a certain number of inferior ones to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals; and as the first would amount to an alienation of State power by implication, the last appears to me the most natural and the most defensible construction.

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[1] No. 31 [Cf. p. 80ff.]

[2] [Article III, section 1.]

But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established, for not to allow the State courts a right of jurisdiction in such cases can hardly be considered as the abridgment of a preexisting authority. I mean not, therefore, to contend that the United States, in the course of legislation upon the objects entrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely if such a measure should be deemed expedient, but I hold that the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of *one whole,* the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited.

Here another question occurs: What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance and from the reason of the thing it ought to be construed to extend to the State tribunals. Either this must be the case or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as *one whole.* The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the Convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions giving appellate jurisdiction to the Supreme Court to appeals from the subordinate federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the Convention, in the first place, authorizes the national legislature "to constitute tribunals inferior to the Supreme Court." It declares, in the next place, that "the *judicial power* of the United States *shall be vested* in one Supreme Court, and in such inferior courts as Congress shall ordain and establish"; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are that they shall be "inferior to the Supreme Court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals, and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the Union. [No. 82]

HAMILTON:

. . . A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases, but it is, of course, left at large in relation to civil causes, there being a total silence on this head. The specification of an obligation to try all criminal causes in a particular mode excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge *the power* of the legislature to exercise that mode if it should be thought proper. The pretense, therefore, that the national legislature would not be at full liberty to submit all the civil causes of federal cognizance to the determination of juries is a pretense destitute of all just foundation.

From these observations this conclusion results: that the trial by jury in civil cases would not be abolished. . . . [No. 83]

# PART SEVEN

# GENERAL CONSIDERATIONS

## 1. A BILL OF RIGHTS

**HAMILTON:**

In the course of the foregoing review of the Constitution I have taken notice of, and endeavored to answer most of, the objections which have appeared against it. There, however, remain a few which either did not fall naturally under any particular head or were forgotten in their proper places. These shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of the remaining objections is that the plan of the Convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked that the constitutions of several of the States are in a similar predicament. I add that New York is of the number. And yet the opposers of the new system, in this State, who profess an unlimited admiration for its constitution, are among the most intemperate partisans of a bill of rights. To justify their zeal in this matter, they allege two things: one is that, though the constitution of New York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favor of particular privileges and rights which in substance amount to the same thing; the other is that the Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed in it, are equally secured.

To the first I answer that the Constitution proposed by the Convention contains, as well as the constitution of this State, a number of such provisions.

Independent of those which relate to the structure of the government, we find the following: Article I, section 3, clause 7—"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." Section 9, of the same Article, clause 2—"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Clause 3—"No bill of attainder or *ex-post-facto* law shall be passed." Clause 7—"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Article 3, section 2, clause 3—"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Section 3, of the same Article—"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And clause 3, of the same section—"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus,* the prohibition of *ex-post-facto* laws and of *titles of nobility, to which we have no corresponding provision in our constitution,* are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital:

> To bereave a man of life [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.[1]

And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas-corpus* act, which in one place he calls "the *bulwark* of the British Constitution."[2]

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.

To the second—that is, to the pretended establishment of the common and statute law by the Constitution—I answer that they are expressly made subject "to such alterations and provisions as the legislature shall from time to time make concerning the same." They are, therefore, at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself.

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[1] [Blackstone, *op. cit.,* I, 136.]

[2] [*Ibid.,* IV, 438.]

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was *Magna Charta,* obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the *Petition of Right* assented to by Charles I in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations. "*We, the people* of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the Convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of construcive powers by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe that there is not a syllable concerning it in the constitution of this State; in the next, I contend that whatever has been said about it in that of any other State amounts to nothing. What signifies a declaration that "the liberty of the press shall be inviolably preserved?" What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense and to every useful purpose, *a bill of rights.* The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the Convention, comprehending various precautions for the public security which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting, therefore, to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the Convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions entirely foreign from the substance of the thing. . . . [No. 84]

## 2. AMENDMENTS AND RATIFICATION

### HAMILTON:

. . . Let us now pause and ask ourselves whether, in the course of these papers, the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it, and whether it has not been shown to be worthy of the public approbation, and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. 'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice will justify to himself, to his country, or to his posterity an improper election of the part he is to act. Let him beware of an obstinate adherence to party, let him reflect that e object upon which he is to decide is not a particular nterest of the community but the very existence of the ation, and let him remember that a majority of America as already given its sanction to the plan which he is to pprove or reject.

I shall not dissemble that I feel an entire confidence in he arguments which recommend the proposed system to our adoption, and that I am unable to discern any real orce in those by which it has been opposed. I am per-uaded that it is the best which our political situation, abits, and opinions will admit, and superior to any the Revolution has produced.

Concessions on the part of the friends of the plan, that t has not a claim to absolute perfection, have afforded matter of no small triumph to its enemies. "Why," say hey, "should we adopt an imperfect thing? Why not amend t and make it perfect before it is irrevocably established?" This may be plausible enough, but it is only plausible. n the first place, I remark that the extent of these con-essions has been greatly exaggerated. They have been tated as amounting to an admission that the plan is radi-ally defective, and that without material alterations the ights and the interests of the community cannot be safely onfided to it. This, as far as I have understood the mean-ng of those who make the concessions, is an entire perversion of their sense. No advocate of the measure can be ound who will not declare as his sentiment that the system, though it may not be perfect in every part, is, upon the whole, a good one, is the best that the present views and circumstances of the country will permit, and is such an one as promises every species of security which a reasonable people can desire.

I answer in the next place that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs and to expose the Union to the jeopardy of successive experiments in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

The reasons assigned in an excellent little pamphlet, lately published in this city,[1] are unanswerable to show the utter improbability of assembling a new convention under circumstances in any degree so favorable to a happy issue as those in which the late Convention met, deliberated, and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worthy the perusal of every friend to his country. There is, however, one point of light in which the subject of amendments still remains to be considered, and in which it has not yet been exhibited to public view. I cannot resolve to conclude without first taking a survey of it in this aspect.

It appears to me susceptible of absolute demonstration that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan it becomes, to the purpose of adoption, a new one and must undergo a new decision of each State. To its complete establishment throughout the Union it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine[2] n favor of subsequent amendment rather than of the orig- nal adoption of an entire system.

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[1] Entitled "An Address to the People of the State of New York."

[2] It may rather be said "ten," for though two thirds may set on foot the measure, three fourths must ratify.

This is not all. Every constitution for the United States ust inevitably consist of a great variety of particulars in hich thirteen independent States are to be accommodated n their interests or opinions of interest. We may of course xpect to see, in any body of men charged with its orig- nal formation, very different combinations of the parts pon different points. Many of those who form a majority n one question may become the minority on a second, and n association dissimilar to either may constitute the ma- ority on a third. Hence the necessity of molding and rranging all the particulars which are to compose the hole in such a manner as to satisfy all the parties to the ompact; and hence, also, an immense multiplication of ifficulties and casualties in obtaining the collective assent o a final act. The degree of that multiplication must evi- ently be in a ratio to the number of particulars and the umber of parties.

But every amendment to the Constitution, if once estab- ished, would be a single proposition, and might be brought orward singly. There would then be no necessity for man- gement or compromise in relation to any other point— o giving nor taking. The will of the requisite number ould at once bring the matter to a decisive issue. And onsequently, whenever nine, or rather ten, States were nited in the desire of a particular amendment, that mendment must infallibly take place. There can, there- ore, be no comparison between the facility of effecting an mendment and that of establishing in the first instance complete constitution.

In opposition to the probability of subsequent amend- ents it has been urged that the persons delegated to the dministration of the national government will always be isinclined to yield up any portion of the authority of hich they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful will be applicable to the organization of the government, not to the mass of its powers; and on this account alone I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing thirteen States at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration which proves beyond the possibility of a doubt that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the Fifth Article of the plan the Congress will be obliged "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." The words of this Article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air. Nor, however difficult it may be supposed to unite two thirds or three fourths of the State legislatures in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.

If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration. Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption as the most direct road to their own object.

The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious:

> To balance a large state or society [says he], whether monarchical or republican, on general laws is a work of so great difficulty that no human genius, however comprehensive, is able by the mere dint of reason and reflection to effect it. The judgments of many must unite in this work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they *inevitably* fall into in their first trials and experiments.[3]

These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain but from time and experience. It may be in me a defect of political fortitude, but I acknowledge that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A nation without a national government is, in my view, an awful spectacle. The establishment of a Constitution in time of profound peace by the voluntary consent of a whole people is a prodigy to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have in so arduous an enterprise upon seven out of the thirteen States, and after having passed over so considerable a part of the ground to recommence the course. I dread the more the consequences of new attempts, because I know that powerful individuals, in this and in other States, are enemies to a general national government in every possible shape. [No. 85]

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[3] Hume's *Essays*. [From "Of the Rise and Progress of the Arts and Sciences," reprinted in *David Hume's Political Essays* ("The Library of Liberal Arts," No. 34, New York: The Liberal Arts Press, Inc.), p. 117.]

# THE CONSTITUTION OF THE UNITED STATES

# THE CONSTITUTION OF THE UNITED STATES

WE THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILITY, PROVIDE FOR THE COMMON DEFENCE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA.

## ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. (1) The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

(2) No person shall be a Representative who shall not have attained to the Age of Twenty-five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

(3) Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent

Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

(4) When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

(5) The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. (1) The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

(2) Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next meeting of the Legislature, which shall then fill such Vacancies.

(3) No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when

lected, be an Inhabitant of that State for which he shall be chosen.

(4) The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless hey be equally divided.

(5) The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of he United States.

(6) The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two hirds of the Members present.

(7) Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, udgment and Punishment, according to Law.

SECTION 4. (1) The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(2) The Congress shall assemble at least once in every ear, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. (1) Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, nd a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day o day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

(2) Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

(3) Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

(4) Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. (1) The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

(2) No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. (1) All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

(2) Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a

Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

(3) Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. (1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

(2) To borrow money on the Credit of the United States;

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

(4) To establish an uniform Rule of Naturalization, and

uniform Laws on the subject of Bankruptcies throughout the United States;

(5) To coin Money, regulate the Value thereof, and of foreign Coin, and to fix the Standard of Weights and Measures;

(6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

(7) To establish Post Offices and post Roads;

(8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

(9) To constitute Tribunals inferior to the Supreme Court;

(10) To define and Punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

(11) To declare War, grant Letters of Marque and Reprisal, and makes Rules concerning Captures on Land and Water;

(12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

(16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

(17) To exercise exclusive Legislation in all Cases what-

soever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. (1) The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

(2) The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.

(3) No Bill of Attainder or ex post facto Law shall be passed.

(4) No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

(5) No Tax or Duty shall be laid on Articles exported from any State.

(6) No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

(7) No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Ex-

penditures of all public Money shall be published from time to time.

(8) No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. (1) No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

(2) No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and control of the Congress.

(3) No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

## ARTICLE II

SECTION 1. (1) The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

(2) Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority and have an equal Number of Votes, then the House of Repesentatives shall immediately chuse by Ballot one of them for President; and if no person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall chuse from them by Ballot the Vice-President.

(3) The Congress may determine the Time of chusing

the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

(4) No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

(5) In Case of the Removal of the President from Office or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

(6) The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

(7) Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. (1) The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

(2) He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Councils, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

(3) The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.

(2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

(3) The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall

be at such Place or Places as the Congress may by Law have directed.

SECTION 3. (1) Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

(2) The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. (1) The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

(2) A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

(3) No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such service or Labour may be due.

SECTION 3. (1) New States may be admitted by the

Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

(2) The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI

(1) All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

(2) This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(3) The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. *In Witness* whereof We have hereunto subscribed our Names,

GEO. WASHINGTON
*Presidt. and Deputy from Virginia.*

### *New Hampshire*

John Landgon
Nicholas Gilman

### *Massachusetts*

Nathaniel Gorham
Rufus King

### *Connecticut*

Wm. Saml. Johnson
Roger Sherman

### *New York*

Alexander Hamilton

### *New Jersey*

Wil: Livingston
David Brearley
Wm. Patterson
Jona: Dayton

### *Pennsylvania*

B. Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Thos. Fitzimons
Jared Ingersoll
James Wilson
Gouv. Morris

### *Delaware*

Geo. Read
Gunning Bedford, Jun
John Dickinson
Richard Bassett
Jaco: Broom

### *Maryland*

James McHenry
Dan of St. Thos. Jenifer
Danl. Carroll

### *Virginia*

John Blair
James Madison, Jr.

*North Carolina*

| | |
|---|---|
| WM. BLOUNT | HU. WILLIAMSON |
| RICHD DOBBS SPAIGHT | |

*South Carolina*

| | |
|---|---|
| J. RUTLEDGE | CHARLES PINCKNEY |
| CHARLES COTESWORTH PINCKNEY | PIERCE BUTLER |

*Georgia*

| | |
|---|---|
| WILLIAM FEW | ABR. BALDWIN |
| Attest | WM. JACKSON, *Secretary* |

# AMENDMENTS

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution.

## THE FIRST TEN AMENDMENTS: THE BILL OF RIGHTS

[*December 15, 1791*]

### ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### ARTICLE II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

### ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

### ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall ssue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## Article VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## LATER AMENDMENTS

### Article XI

[*January 8, 1798*]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### Article XII

[*September 25, 1804*]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## ARTICLE XIII

[*December 18, 1865*]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XIV

[*July 21, 1868*]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV

[*March 30, 1870*]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XVI

*[February 25, 1913]*

The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## ARTICLE XVII

*[May 31, 1913]*

Section 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

Section 2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; Provided, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

Section 3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

## ARTICLE XVIII

*[January 29, 1919]*

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## ARTICLE XIX

*[August 26, 1920]*

Section 1. The rights of citizens of the United States to vote, shall not be denied or abridged by the United States or by any State on acount of sex.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XX

*[February 6, 1933]*

Section 1. The terms of the President and Vice President shall end at noon on the twentieth day of January, and the terms of Senators and Representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the fifteenth day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission.

## ARTICLE XXI

[*December 5, 1933*]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## ARTICLE XXII

[*March 1, 1951*]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three fourths of the several States within seven years from the date of its submission to the States by the Congress.

# FORUM BOOKS

**John Adams:** ***The Political Writings of***
Representative Selections, with an Introduction, b
George A. Peek, Jr. (FB 5)

**John C. Calhoun:** ***A Disquisition on Governmen***
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